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In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 180

SOUTHWESTERN GREYHOUND LINES, INC.,
Petitioner,

v.

A. L. BUCHANAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

and

BRIEF IN SUPPORT THEREOF

VIRGIL T. SEABERRY,
Eastland, Texas,

ROBERT G. PAYNE,
505 Republic Bank Building,
Dallas, Texas,
Attorneys for Petitioner.

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INDEX

	Page
Petition for a Writ of Certiorari	1–14
Summary and Short Statement of Matters Involved	1
Statement of the Basis for Jurisdiction	10
Questions Presented	11
Reasons Relied on for Allowance of the Writ	11
Appendix: Specifications of Error	i–iv
Brief in Support of Petition for Writ of Certiorari	15–35
The Opinion of the Court Below	15
Jurisdiction	15
Statement of the Case	15
Specifications of Error	16
Points and Argument in Support Thereof	16–34
Point I. No false statement vitiating the release was made by any representative of petitioner, as the only statement made by claim agent Massey was not false, and Dr. Curb was not a representative of petitioner. (Germane to Specifications 1, 2 and 3)	16
Summary of Argument	16–17
Argument	17–24
Point II. The charge of the trial court permitting the release to be set aside if Dr. Curb was acting for either or both parties was erroneous and was not a submission of petitioner's requested charge that if Dr. Curb was respondent's physician and not the agent of petitioner, the release could not be set aside because of statements made by him. (Germane to Specifications 4 and 5)	24
Summary of Argument	24–25
Argument	25–29

Page

Point III. The Circuit Court, in affirming the judgment, based its action upon a misconstruction of the charge of the trial court; and since the charge as construed by the Circuit Court was neither raised in the case nor given to the jury by the trial court, the judgment of the Circuit Court is erroneous. (Germane to Specifications 6 and 7) 30

Summary of Argument 30

Argument 30–34

Conclusion 34–35

Page

Alenkowsky v. Texas & N. O. R. Co., 188 S. W. 956 23

A. L. R., Volume 48, page 1508 23

Austin, et al. v. Rupe, et al., 141 S. W. 547 27

Blair v. Baird, 94 S. W. 116 27

Colorado Springs & Interurban Ry. Co. v. Huntling, 181 Pac. 129 23

Corpus Juris Secundum, Volume 3, page 192 19

Dallas Ry. & Terminal Co. v. Ector, 116 S. W. (2d) 683 29

Douda v. Chicago, R. I. & P. Ry. Co., 119 N. W. 272 20, 21

El Paso Elec. R. Co. v. Cowan, 248 S. W. 442 23

Farrar, Walton, Administrator, et al. v. John Churchill, Trustee, et al., 135 U. S. 609 18

Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S. W. 517 29

Fuchs, et al. v. Leahy, 9 S. W. (2d) 897 27

Goodwin v. Daniel, et al., 93 S. W. 534 27

Gulf, C. & S. F. Ry. Co. v. Huyett, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669 23

H. & T. C. Ry. Co. v. McCarty, 94 Tex. 298, 60 S. W. 429 ii

Jones v. Gulf, C. & S. F. Ry. Co., 73 S. W. 1082 23

Lipscomb v. Houston Elec. Co., 149 S. W. (2d) 1042 ..... 11–12, ii, 22

Mechem on Agency (2nd Ed.), Volume 2, Sec. 2140 28

M. K. & T. R. Co. v. Haven, 200 S. W. 1152 23

M. K. & T. R. Co. v. McGlamory, 89 Tex. 635, 35 S. W. 1058 29

Panhandle & Santa Fe Ry. Co. v. O'Neal, 119 S. W. (2d) 1077 ..... ii, 19

Quebe v. Gulf, C. & S. F. R. Co., 98 Tex. 6, 66 L. R. A. 734, 81 S. W. 20, 1 Ann. Cas. 545 23

Page

R. C. L., Volume 23, page 393 23

Sitchon v. American Export Lines, 113 Fed. (2d) 830 12

St. Louis S. W. R. Co. v. Thomas, 244 S. W. 839 23

Texas Jurisprudence, Volume 20, pages 17-19, Sec. 8 18

Texas Midland R. Co. v. Wilson, 263 S. W. 1109 23

T. & N. O. R. Co. v. Hawkins, 112 S. W. (2d) 1107 ii

Whitsel, et al. v. Hoover, et al., 120 S. W. (2d) 930 18

Williston, Law of Contracts:
Volume 3, Sec. 1487 18
Volume 3, Sec. 1491 19

Code

Judicial Code, Sec. 240(a), Act of February 13, 1925 [28 U. S. C. A. 347(a)] 10

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No. .....

SOUTHWESTERN GREYHOUND LINES, INC.,
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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

To the Honorable the Supreme Court of the United States:

Comes now Southwestern Greyhound Lines, Inc., petitioner, and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the District Court of the United States for the Northern District of Texas at Abilene, in which a settlement agreement covering a personal injury claim was set aside and additional damages awarded, and petitioner respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED

In this case, for the first time in the history of Texas Jurisprudence, a jury was permitted to set a release aside

for "fraud" if it believed to be incorrect the opinion of a physician employed by the **releasor,** and not alleged to have had any connection with the releasee. The decision is far-reaching in its necessary effect upon the future of compromise settlements. It marks a departure from the past policy of Texas law favoring and encouraging compromises—for if a release can be set aside whenever the extent of the injuries as estimated by the physician employed by the **releasor** at the time of the settlement is less than the extent of injuries as testified to by another physician employed by the **releasor** at the time of a trial, releases in most instances become utterly valueless, and there is left no incentive to compromise.

Neither bad faith nor mutual mistake is involved in the case. The facts, briefly, are:

Respondent's wife sustained injuries in an automobile collision with petitioner's bus near Albany, Texas, on January 7, 1939. She was riding in a private car with her sister, a Mrs. Brice, at whose home she was visiting (R. 157). Mrs. Brice lived in Albany and her family physician there was a Dr. D. G. Curb (R. 95). Because he was the Brice family physician, Dr. Curb was called upon to examine and treat both Mrs. Brice and respondent's wife (R. 95). They were attended by Dr. Curb at his office in Albany on the night of the accident, which was Saturday, January 7th (R. 437). On Sunday, January 8th, Dr. Curb visited and attended respondent's wife at Mrs. Brice's home (R. 439). On Monday, January 9th, a claim agent of petitioner by the name of Massey, who was investigating the accident, called on Dr. Curb and asked for and received reports, both oral and written, covering the injuries sus-

tained by respondent's wife and Mrs. Brice (R. 512). On the same day he called on respondent's wife and Mrs. Brice and asked for and received statements from them (R. 198, 514). Settlements were not discussed at that time (R. 514).

In Dr. Curb's report relative to respondent's wife he stated in substance, both orally and in writing, that her injuries were not serious and that she would recover in a short time (R. 591-2). Claim Agent Massey advised respondent's wife of his conversation with her doctor, and that the doctor had stated that her injuries were not serious and that she would be all right in a short time (R. 172). He likewise advised respondent of Dr. Curb's opinion the following Wednesday, January 11th, when settlement negotiations were entered into (R. 516). Dr. Curb prior to his conversation with Massey on January 9th, had advised respondent's wife to the same effect, namely that "she would be well as ever in a few days and that in (his) opinion her injuries were trivial" (R. 471-2). Respondent offered testimony (and the matter is not here disputed) that after quoting Dr. Curb, Massey added his own assurances to the effect that the injuries sustained by respondent's wife were not serious and that she would be all right in a short time (R. 319).

On the morning of January 11th, a settlement was discussed by Massey and respondent. Massey's offer to pay the doctor bill and twenty-five dollars additional was rejected, but respondent's counter offer (R. 324) to accept fifty dollars plus the doctor bill was agreed upon; and that afternoon respondent and his wife executed a release (R. 588). Petitioner's check, which recited that it

was in full settlement of any claims against petitioner for injuries sustained by respondent's wife, was endorsed by respondent and his wife and was cashed on January 17, 1939 (R. 590).

Approximately a year and a half later, in a suit instituted by respondent against petitioner in the State District Court of Shackelford County, Texas, the release was attacked in a trial then had, but petitioner's motion for an instructed verdict was sustained and judgment was rendered for petitioner (R. 32). On a motion by respondent, however, the judgment was set aside and respondent was permitted to take a non-suit (R. 34). Thereafter this suit was filed in the United States District Court at Abilene, Texas, in a second attempt to set aside the release for alleged fraud (R. 1-25). While other grounds for setting aside the release were contained in the petition, they were rejected by the trial court, the jury being charged only upon the issue of fraud (R. 609-10).

The trial court charged the jury that it could set aside the release for fraud, regardless of the honesty and good faith of the representations made:

(1) If claim agent Massey's statement that Dr. Curb had said respondent's wife was not seriously hurt and would be all right in a short time, was untrue (R. 607) (the court perhaps also intending for the jury to consider Massey's own assurances to the same effect), or

(2) If Dr. Curb's statements to Massey that respondent's wife was not seriously hurt and would be all right in a short time were untrue[1] (R. 608).

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[1] See Point II, page 24 of Supporting Brief for a more complete analysis of the trial court's charge.

It is undisputed that the statements were made.

Subdivision (1) above of the court's charge submitted nothing of substance. Neither the repetition by Massey of a statement made by Dr. Curb (if the repetition was accurate), nor the expression of his own (a layman's) opinion, could meet even the first, universally recognized test of fraud: "a **false** representation of a material **fact.**" The trial court's charge in this connection appears to relate solely to the repetition of Dr. Curb's statement, for the court charged (R. 607): "* * * about the fourth day after the injury, [it is said] that the defendant's agent, Massey, called upon her [respondent's wife] and stated in part to her that, 'I am surprised to find you in bed, from what your doctor has said about you I would have imagined that you would be up from your injuries; that your injuries are not permanent and that you should be up and well in a short time.'" The court then charged the jury to find whether the statements were true or untrue. This charge does not appear to make any reference to Massey's own views; but if it was intended to include such views, it would make no difference. Massey's views, at best, constituted not a statement of **fact** but a statement of **opinion,** based on the same or less information than respondent and his wife had. While the Texas courts have under some circumstances (see Supporting Brief attached) held that the statement of a releasee's physician, because of his specialized training and presumably discerning examination, may be considered a statement of fact as distinguished from a statement of opinion, no Texas court (or any other court so far as we know) has ever suggested that the

statement of a layman as to a claimant's condition could ever be considered a statement of **fact.**

As to Massey's statement concerning what Dr. Curb had told him, the record is undisputed that Dr. Curb did tell Massey exactly what Massey told respondent (R. 591-2: Dr. Curb's written report to Massey; also R. 442-3; R. 471-2; R. 172). It has never been claimed by either petitioner or respondent that Dr. Curb **did not** tell Massey that respondent's wife was not seriously hurt and would be all right in a short time. It is not claimed by respondent that Massey quoted Dr. Curb incorrectly. Since the correctness of Massey's repetition of what Dr. Curb said is not questioned, and since Massey's own view, even if included in the court's charge, was at best the opinion of a layman, the aforesaid primary requirement of fraud, namely that the representation relied upon be "a **false** representation of **fact**" is wholly lacking here. And so we merely get back to the basic issue, set forth in the first paragraph of this Summary and Statement and covered by subdivision (2) above of the trial court's charge: **Can Dr. Curb's opinion itself be made the basis of fraud?**

This is the real core of the law suit. Whether the jury undertook to return a verdict under the court's direct charge with reference to fraud on the part of Dr. Curb (R. 608) or under the charge relating to Massey's statement as to what Dr. Curb had said (R. 607), the issue necessarily turned on whether or not the jury believed that Dr. Curb had made a mis-statement. Obviously the jury could not have found that Dr. Curb **did not** make a mis-statement but that Massey **did**—for Massey is not charged by respondent with having said any more or anything

other than what Dr. Curb said. But even assuming that the verdict might have been based on subdivision (1) of the court's charge rather than subdivision (2) thereof, nevertheless the jury was definitely instructed, in subdivision (2) above of the court's charge, that if it believed Dr. Curb had made a mis-statement, it should set aside the release and return a verdict for respondent. Under such instruction, the jury was **required** to return a verdict against petitioner if it believed Dr. Curb had made a mis-statement, even though it also believed that petitioner was in no wise responsible for such mis-statement. **Such charge of the court ignored the total absence of either pleading or proof upon which responsibility on petitioner's part for the statements of Dr. Curb could be based.**

It was neither alleged nor proved that Dr. Curb was employed by petitioner. On the contrary, it was undisputed that Dr. Curb was employed by respondent's wife. Respondent's petition described Dr. Curb as his wife's "attending physician" (R. 10-11). When Dr. Curb was employed by respondent's wife to attend her, he had had no contact or connection of any kind with petitioner (R. 441, 485). His employment by respondent's wife grew out of the fact that he had for many years been her sister's family physician (R. 95); he was the physician in attendance upon both her sister and herself (R. 437).

No question of bad faith on Dr. Curb's part was raised either in the pleadings or the evidence. It was his honest opinion at the outset that the injuries were not serious, and that remained his opinion at the time of the trial almost two years later (R. 442), although on the latter date

he believed respondent's wife to be seriously ill from tuberculosis, unrelated to the accident (R. 391).

No character of collusion between Dr. Curb and petitioner was charged in respondent's petition or submitted to the jury.

This is simply a case, without precedent though it be, in which a jury was permitted to set aside a release for fraud based upon the opinion of the **releasor's** physician. While statements made by a **releasee's** physician have sometimes been made the basis of fraud in setting aside releases, we know of no case other than this one in which a release has been set aside for fraud based upon the statements or representations of a **releasor's** own physician.

The Circuit Court affirmed the judgment in this case upon the theory that the trial judge charged the jury that if respondent "believed that the doctor [Dr. Curb] was acting not merely for plaintiff alone but for both parties, he would be bound by the release." The Circuit Court held that such charge protected petitioner in that it "covered" petitioner's requested charge that respondent could not recover if Dr. Curb was employed by and was the agent of respondent and not petitioner. This latter holding, which we would describe as a secondary error, is challenged in detail in the Supporting Brief attached hereto. The primary error, petitioner submits with all deference to the Circuit Court but without any qualification whatever, arises from the fact that the trial judge **did not so charge the jury.** We would not think of making such a dogmatic statement if there were the slightest possibility that we

might fail in the proper place hereinafter[2] to make entirely clear to this Court that no such charge was given by the trial judge. Furthermore, such theory of the Circuit Court, upon which the trial court's charge was approved (i. e. that respondent could not recover if he believed that Dr. Curb was acting for both parties instead of for respondent alone) was not even raised in the case: it was not alleged nor suggested anywhere in respondent's petition or in petitioner's answer; it was not raised by the evidence; it was not asserted or mentioned by either party in the briefs filed in the Circuit Court; and certainly it was not contained in the trial court's charge. We believe respondent will concede the correctness of this statement.

The trial court actually charged the jury that if Dr. Curb was acting for both parties, respondent **could** recover. This was error. The trial court further charged the jury that if Dr. Curb was acting for **either** party, respondent **could** recover. This was further error. Such charge as given by the court was the exact opposite of petitioner's requested charge. Under the law as thus given to the jury, the latter had no other alternative than to set aside the release for fraud if it believed Dr. Curb's opinion to have been incorrect, without regard to any responsibility on petitioner's part for such opinion. **It is this appalling and far-reaching error of law, permitting the vitiating of a release for fraud based upon the opinion of releasor's own physician, that is here challenged most earnestly by petitioner.**

In the Supporting Brief attached hereto, petitioner has undertaken to demonstrate, by reference to the applicable

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[2] See Point III, page 30 of Supporting Brief.

authorities, that there is no basis upon which this case could properly have been submitted to a jury, and that the judgment entered herein should be reversed and rendered against respondent; and in the alternative (but only in the alternative) that if under any theory it was proper for the jury to find that respondent was misled by the statements and representations of Dr. Curb, the jury should have been charged, as specially requested in writing by petitioner (R. 612), that respondent could not set aside the release and recover from petitioner if Dr. Curb was employed by and was the agent of the respondent, instead of being charged, as it actually was by the trial court, that respondent could recover if Dr. Curb was acting for either party or both parties.

STATEMENT OF THE BASIS FOR JURISDICTION

(a) The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code as Amended by the Act of February 13, 1925, 28 U. S. C. A. 347(a).

(b) The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions cited, and within the provisions of Rule 38, paragraph 5, as set out herein under the heading "Reasons Relied on for Allowance of the Writ."

(c) The judgment of the Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered February 24, 1942 (R. 699). A petition for rehearing was filed within the time allowed by the Rules of said Circuit Court of Appeals and was denied May 14, 1942 (R. 776).

QUESTIONS PRESENTED

1. Whether representations of a releasor's physician may be made the basis of fraud on the part of releasee so as to vitiate a release.

2. Whether a truthful repetition by releasee's claim agent of the opinion of the releasor's physician, coupled with the concurring opinion of such claim agent, may be made the basis of fraud on the part of the releasee so as to vitiate a release.

3. Whether the representations of a physician with reference to the extent of injuries may be made the basis of fraud on the part of the releasee so as to vitiate a release in the absence of a finding that such physician was employed by and was the agent of the releasee.

4. Whether a circuit court may affirm a judgment upon a theory or proposition wholly foreign to the case as tried, not raised or supported by pleading or evidence.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. **Conflict with Applicable Local Decisions.** In permitting a release to be set aside for fraud based upon statements and representations made by the attending physician for respondent's wife, employed by her and having no connection with petitioner, the decision in this case, involving an important question of local law, is in conflict with the applicable decisions of the courts of Texas. The latest applicable Texas decision, **Lipscomb v. Houston**

Electric Co., 149 S. W. (2d) 1042 (March 27, 1941) states the law in Texas briefly but clearly:

> "It seems to be the settled law in this State that in order to avoid the effect of a release on the ground of misrepresentation or fraud on the part of physicians, the releasor must show that the physician was employed by the releasee, since otherwise the latter would not be responsible for their representations and advice."

It is highly important that the wise policy of the Texas courts in looking with favor and approval upon compromises and in encouraging the settlement of disputes be not jeopardized by a doctrine that would permit a settlement to be set aside merely because the physician attending the claimant at the time of a settlement considered the injuries less serious than did a physician employed thereafter and testifying at the trial (thereby furnishing the basis of a finding that the opinion of claimant's attending physician at the time of the settlement was incorrect).

2. **Conflict with Decision of Another Circuit Court.** In affirming a judgment permitting the cancellation of a release for fraud based upon the statements of the releasor's physician, the Circuit Court has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of **Sitchon v. American Export Lines**, 113 Fed. (2d) 830. In the latter case the court upheld a settlement made by a seaman because it was made upon the advice of his own doctor and lawyer, even though another physician later found a fracture of his skull which would result in permanent disability. The court in that case pointed out the difference

between the situation involved therein and one in which the releasor may have acted upon the advice of the physician of releasee, holding (page 832):

> "If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release."

In the **Sitchon** case the claimant described the situation arising out of the mis-statement or understatement of his own physician as a "mutual mistake." In the instant suit respondent describes the situation arising out of the mis-statement or understatement of his own physician, Dr. Curb, as "fraud." The name by which a claimant chooses to designate such a mis-statement or understatement cannot be effective to destroy the principle of law that a mis-statement or understatement of releasor's physician cannot be used to set aside a release.

3. **Departure from Accepted Course of Judicial Proceedings.** The Circuit Court in this case departed from the accepted and usual course of judicial proceedings in that it affirmed the judgment of the trial court upon a proposition or theory that was never in the case from the time respondent filed his petition until the time of the opinion of the Circuit Court. The Circuit Court held that the law of Texas was set forth in a charge that if respondent "believed that the doctor was acting not merely for the plaintiff alone but for both parties, he would be bound by the release." Without regard to whether or not that is the "law of Texas," such a charge was never given in this case. If it had been given, it would have been un-

supported by evidence. If evidence thereon had been offered, it would have been unsupported by pleadings. Petitioner was never afforded an opportunity to defend itself against the theory that the release would not be binding if respondent believed that the doctor was acting for respondent alone, as no such belief on the part of respondent was alleged and no proof relating thereto was offered. That the trial court's charge did not remotely suggest such theory is fully developed in the Supporting Brief attached hereto. Petitioner respectfully submits that the action of the Circuit Court in deciding the case upon a theory not raised or involved therein is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue in this cause to the United States Circuit Court of Appeals for the Fifth Circuit, and that upon hearing by this Honorable Court the judgment of said United States Circuit Court of Appeals for the Fifth Circuit be reversed; and that petitioner have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

VIRGIL T. SEABERRY,

ROBERT G. PAYNE,

Attorneys for Petitioner.

APPENDIX

SPECIFICATIONS OF ERROR

The following errors were assigned in the Circuit Court and are specifically brought forward and made a part of this petition:

1. No false statement vitiating the release was made by any representative of petitioner, and, therefore, the Circuit Court erred in not sustaining petitioner's assignments of error relating to the failure of the trial court to instruct a verdict for petitioner.

2. The Circuit Court erred in not sustaining petitioner's assignment of error reading as follows:

> "The verdict is unsupported by the evidence and is contrary to the great preponderance of the evidence, and plaintiff wholly failed to prove fraud by clear, unequivocal and convincing evidence as required, in that:
>
> "The representations made to plaintiff by Frank Massey were made as a layman, and not as a doctor; he was merely repeating an opinion expressed by Dr. Curb, who was plaintiff's physician and not defendant's; such representations were true, and not false, as shown by Dr. Curb's written statement to defendant; prior to the time Massey talked with plaintiff, Dr. Curb had told plaintiff that in his opinion his wife was not seriously hurt, or the substance of what he later stated to defendant in writing, and as a consequence plaintiff could not have relied upon the statements made by Massey; plaintiff accepted the Fifty Dollar ($50.00) check, which recited on its face that it was to cover his wife's injuries, and never cashed same for five days, during which time he knew that his wife had not fully recovered; in the meantime, plaintiff had many opportunities to inquire of Dr. Curb if he made the statements repeated to plaintiff

by Massey, and though such opportunity was afforded plaintiff he never made any inquiry of Dr. Curb if said statements were made and true, thereby estopping himself from claiming fraud in connection therewith."

3. The holding of the courts below, when substantially viewed, are in conflict with the holding of the Texas courts in the cases of **Lipscomb v. Houston Electric Company,** 149 S. W. (2d) 1042, **T. & N. O. Ry. v. Hawkins,** 112 S. W. (2d) 1107, **Panhandle Railway Company v. O'Neal,** 119 S. W. (2d) 1077, and **H. & T. C. Railway Company v. McCarty,** 94 Tex. 298, 60 S. W. 429, all holding that in order to avoid a release on the ground of fraud on the part of a physician, the releasor must show that the physician was employed by the releasee, since, otherwise, the latter would not be responsible for his representations and advice.

4. The Circuit Court erred in not sustaining petitioner's assignment of error reading as follows:

"The court erred in overruling and in refusing to give the following special instruction requested by the defendant:

"'If you find from the evidence that prior to the settlement Dr. Curb stated that Mrs. Buchanan's injuries were not as great as they really were, and you further find that plaintiff believed the statement of the doctor to be true, and relied thereon; nevertheless, if you further find that Dr. Curb was a physician of Mrs. Buchanan's own choice, and not the agent or employee of the defendant, the release and draft endorsement are binding on plaintiff and you should find for the defendant and so say by your verdict.'"

5. The trial court's charge being as follows:

"If the minds of the parties met and he understood at the time he signed it that his doctor had repre-

sented that his wife should be up and not in bed, and you further believe that this doctor was acting not merely for the plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent and conveyed to the plaintiff were not true, but were made to induce him to make the settlement, and that he acted upon them and that a man situated with the environments and conditions in which the plaintiff was situated and in which the defendant saw him situated, would have, in the exercise of ordinary prudence and judgment, acted as he acted, and relied upon the statements, then he may recover."

and the special charge requested by petitioner being as follows:

"If you find from the evidence that prior to the settlement Dr. Curb stated that Mrs. Buchanan's injuries were not as great as they really were, and you further find that plaintiff believed the statement of the doctor to be true, and relied thereon; nevertheless if you further find that Dr. Curb was a physician of Mrs. Buchanan's own choice, and was not the agent or employee of the defendant, the release and draft endorsement are binding on plaintiff and you should find for the defendant and so say by your verdict."

the Circuit Court erred in finding and holding that the special charge "was covered by the general charge."

6. The Circuit Court, in affirming the judgment of the trial court, based its action upon a misconstruction of the charge of the trial court; and such error in construction is vital to the disposition of the case.

7. The trial court having charged the jury as follows:

"If the minds of the parties met and he understood at the time he signed it that his doctor had represented that his wife should be up and not in bed, and you further believe that this doctor was acting not

merely for the plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent and conveyed to the plaintiff were not true, but were made to induce him to make the settlement, and that he acted upon them and that a man situated with the environments and conditions in which the plaintiff was situated, would have, in the exercise of ordinary prudence and judgment, acted as he acted, and relied upon the statements, then he may recover."

the Circuit Court erred in construing the charge as follows:

"In substance, the Judge charged the jury that if the minds of the parties met at the time Buchanan signed the release and he believed that the doctor was acting not merely for plaintiff alone but for both parties, he would be bound by the release, but if the jury should find that the statements made by the agents to plaintiff were not true but were made to induce him to make the settlement and he acted upon them, in the exercise of ordinary prudence and judgment, relying upon the statements, he could recover; that if plaintiff did not believe them, he could not recover."

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was rendered on February 24, 1942. It is not yet reported, but may be found at page 698 of the printed record.

JURISDICTION

A statement of the basis of the jurisdiction of this Court is contained in the Petition, and in the interest of brevity is not repeated here.

STATEMENT OF THE CASE

The essential facts of the case are stated in the Petition, and in the interest of brevity are not repeated here.

SPECIFICATIONS OF ERROR

The errors to be urged are set forth in the appendix to the Petition and in the interest of brevity are not repeated here.

POINTS AND ARGUMENT IN SUPPORT THEREOF

POINT I.

No false statement vitiating the release was made by any representative of petitioner, as the only statement of fact made by Claim Agent Massey was not false, and Dr. Curb was not a representative of petitioner. (Germane to Specifications 1, 2 and 3).

Summary of Argument

It is undisputed that Dr. Curb stated to Massey that respondent's wife was not seriously hurt and would be all right in a short time, and that Massey repeated the statement to respondent and added his own assurances to the same effect. These are the only statements claimed to have been made.

The trial court overruled petitioner's motion for an instructed verdict and charged the jury that if it found any of the foregoing statements to be incorrect, the release could be set aside for fraud.

To constitute fraud there must be (1) a **false** representation (2) of a material **fact** (3) by a **representative** of the party charged with the fraud.

Massey correctly repeated what Dr. Curb told him, and such repetition was not a "**false** representation." Respondent does not claim that the repetition was false.

Massey's own statement that respondent's wife was not seriously hurt and would be all right, being the statement of a layman and not a skilled physician, was purely an opinion and not a statement of **fact.**

Dr. Curb was employed by respondent's wife because he was her sister's family physician. Dr. Curb was respondent's attending physician and had no connection with petitioner. His representations, therefore, whether correct or incorrect, were not the representations of petitioner.

There being no element of fraud present in the case, the trial court was in error in submitting it to the jury.

Argument

Petitioner's motion for an instructed verdict based on the theory that respondent failed to establish any ground for setting aside the release was overruled, and the jury was charged that the release could be set aside if it was procured by fraudulent representations. The representations referred to by the court were:

(A) Claim Agent Massey's statement to respondent and his wife (1) that Dr. Curb said respondent's wife was not seriously hurt and would be all right in a short time; and (2) that respondent's wife was not seriously hurt and would be all right in a short time (R. 607).

(B) Dr. Curb's statement to Massey that respondent's wife was not seriously hurt and would be all right in a short time (R. 608).

Respondent does not claim that any statements other than the foregoing were made.

(A) **Claim Agent Massey.**

The test of fraud by which Massey's statements must be measured is quite simple: Did he make (1) a **false** statement of (2) a material **fact?**[1]

The statement by claim agent Massey that Dr. Curb said respondent's wife was not seriously hurt and would be all right in a short time was not **false.** The record is entirely without dispute that Dr. Curb did say exactly what Massey quoted him as saying (R. 442-3, 471-2, 591-2, 172). Respondent has never claimed that the repetition was inaccurate. In fact, both respondent (R. 531) and petitioner (R. 442) offered in evidence Dr. Curb's written report to Massey made on January 9, 1939, reading:

> "Opinion: Outside of general soreness, there should be no disability as result of injuries. Complete recovery expected within two weeks following date accident" (R. 592).

Since there is nothing in the record to suggest that Massey's statement as to what Dr. Curb told him was not an accurate repetition, element (1) above of actionable fraud is not present, and such correctly quoted opinion of the releasor's doctor cannot be made the basis for setting aside the release. While a misrepresentation of what releasor's doctor said may be made the basis of fraud (**Pom-**

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[1] Williston's **Law of Contracts,** Volume 3, Section 1487, names the first essential of fraud: "(1) A **false** representation of a material **fact.**"

Texas Jurisprudence, Volume 20, pages 17-19, Section 8: "Actionable fraud exists when one makes a **false** representation of a material **fact.**"

Walton Farrar, Administrator, et al. v. John Churchill, Trustee, et al., 135 U. S. 609, adopted in **Whitsel, et al. v. Hoover, et al.** (Tex. Civ. App.), 120 S. W. (2d) 930 (error dismissed): "The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed, and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material **fact,** and must be **false** * * *" (Emphasis supplied).

eroy's Equity, Section 878), a truthful repetition of a statement by releasor's doctor cannot constitute fraud.[2]

As to Massey's personal views [which the trial court apparently did not consider material, as they do not appear to be included in his charge to the jury (R. 607)], they fail to meet element (2) above of the first essential of fraud. A representation must be one of **fact** and not of **opinion.**[3] Here, when Massey said that respondent's wife was not seriously hurt and would be all right in a short time, such statement was obviously an expression of Massey's judgment and opinion, and was not a statement of known **fact.**

In Section 1491, Volume 3, **Law of Contracts,** Williston says:

> "Even when statements positive in form are made, the hearer may often know perfectly well that the expression is necessarily one of opinion."

and in 3 **Corpus Juris Secundum** 192, it is said:

> "Mere statements of opinion on the part of the agent, where the person to whom such statement was made was as able as the agent to form an opinion to determine for himself, does not constitute fraud for which the principal will be liable."

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[2] **Panhandle & Santa Fe Ry. Co. v. O'Neal** (Tex. Civ. App.), 119 S. W. (2d) 1077, error refused: "Taylor's [the claim agent's] statement to O'Neal as to what Dr. Rush told him (and on which statement alone O'Neal testified he relied in executing the release) was shown by the undisputed evidence to be true. * * * The statement by Taylor as to what Dr. Rush said being the statement, according to plaintiff's testimony, that plaintiff relied on and that induced him to execute the release and that statement being true, * * * is certainly no support for cancellation of the release."

[3] For exception to this rule see cases cited in footnotes, p. 23, supra, wherein under some circumstances the opinion of a releasee's doctor, because of his specialized training, may be considered a statement of fact.

Massey was not a doctor (R. 516), and the record does not indicate that he made any examination of respondent's wife. She knew how she felt, and how much or how little pain she had, matters concerning which Massey could have had no knowledge. She had been examined by and talked with, and had full access to her own physician, and the latter was Massey's only source of information. Such information as he obtained from that source, Massey passed on to respondent and his wife. Obviously Massey knew less than either of them, and they must have known "perfectly well that his expression was necessarily one of opinion." What Massey said could have been of little or no importance even as an opinion. Certainly it was no more than that.

The opinion of the Supreme Court of Iowa in the case of **Douda v. Chicago R. I. & P. Ry. Co.**, 119 N. W. 272, is illustrative of the position of petitioner herein with reference to **both** of the statements charged to Massey. There the court said:

> "It was also error in connection with the allegations of fraud to submit the question whether defendant's agent, as an inducement to the settlement, represented that plaintiff's injuries were slight and that he would recover therefrom. The only evidence as to such representations was that defendant's claim agent at the time of procuring a settlement represented that he understood from defendant's physician that plaintiff would be well in three weeks, and further that the claim agent stated affirmatively that plaintiff would be well in three weeks. **It was not shown that the statement as to what the physician said was false,** and the direct representation that plaintiff would recover in three weeks **was evidently merely an expression of opinion**, not shown to have been fraudulently made" (Emphasis supplied).

In the **Douda** case, the claim agent quoted the defendant's physician, to whom the plaintiff presumably would not have had the same access as did respondent here to his own physician. In the **Douda** case, as here, "it was not shown that the statement as to what the physician said was false." In the **Douda** case, as here, "the direct representation that plaintiff would recover (within a short time) was evidently merely an expression of opinion." **There is simply no basis in law for the rescission of the settlement agreement involved herein because of either or both of the statements charged to Massey.**

(B) **Dr. Curb.**

It is undisputed that Dr. Curb stated, both to Massey and to respondent's wife, that she was not seriously hurt and would be all right in a short time (R. 592, 471-2). That was his opinion on January 9, 1939, and that was still his opinion at the time of the trial, November 21, 1940.[4]

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[4] The record pertaining to this point is quite vital. It reads (R. 442-3):

"Doctor [Curb], I want to read to you the last paragraph, under the heading, 'Opinion.' (Reading) 'Outside of general soreness, there should be no disability as a result of injuries. Complete recovery expected within two weeks following the date of the accident.'

"Q. Do you recall having made that report to Mr. Massey?

"A. Yes, sir.

"Q. Did you?

"A. Yes, sir.

"Q. I wish you would tell the court and jury whether or not that was your honest judgment of the condition of that woman at that time?

"A. Yes, sir, that was my honest opinion.

"Q. I will ask you to tell the court and jury whether or not you had occasion since to change that opinion?

"A. No, sir.

"Q. You still believe that?

"A. Yes, sir.

"Q. And you told Mr. Frank Massey that when he asked you

Now, respondent did not allege that Dr. Curb was guilty of any fraud in making such statement (R. 1-25). This is understandable, as respondent would naturally be hesitant to try to base fraud on the opinion of his own doctor. Nevertheless the trial court charged the jury that if it believed Dr. Curb's statements were untrue, the settlement agreement could be set aside and respondent could recover[5] (R. 608). With or without pleading to support it, such charge was not a correct statement of the law of Texas. The latest Texas decision on the point, **Lipscomb v. Houston Elec. Co.**, 149 S. W. (2d) 1042, was referred to in the petition for a writ, but for the court's convenience, the quotation, which is quite short, is repeated here:

> "It seems to be the settled law in this state that in order to avoid the effect of a release on the ground of misrepresentation or fraud on the part of physicians, the releasor must show that the physician was employed by the releasee, since otherwise, the latter would not be responsible for their representations and advice."

It is uncontroverted in the record that Dr. Curb was employed by, was in attendance upon and was the physician of respondent's wife, and had no connection with petitioner.[6]

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about these people?
"A. Yes, sir."

And R. 471-2:

"Q. In this statement you said you signed in which you said was true, you said, 'I do not think the injury is serious and so advised Mrs. Buchanan.' And then you said, 'I advised Mrs. Buchanan she would be well as ever in a few days and that in my opinion her injuries were trivial.' When was it you advised her that—that was before you made this statement for Mr. Massey?
"A. That was before I made this statement for Mr. Massey, yes, sir."

[5] The trial court's charge that this was so if the doctor was acting "for either or both parties in this transaction" is considered in detail under Point II hereof.

[6] See Summary and Short Statement, pages 2 and 3 of the Petition, for detailed facts and record references.

The courts of Texas have frequently had difficulty in drawing a clear-cut line of distinction between a statement of a releasee's physician which is purely an opinion[7] and one which may be considered "a statement of fact."[8] This problem is only encountered in determining when a release can or cannot be set aside by virtue of a mis-statement by a **releasee's** physician. No problem has ever arisen when the statement has been made by a **releasor's** physician.

The rule covering the latter situation is summarized in 23 R. C. L. 393:

> "The fact that a releasor, in making the settlement, relies on the opinion of his own physician as to the nature and probable results of his own injuries, does not afford any ground for setting aside the release, though the opinion is incorrect."

The same rule is recognized in 48 A. L. R. 1508, wherein it is said:

> "It has been held that misrepresentations regarding the nature and extent of the injury, made by physicians of the releasor, do not constitute a basis for avoidance of the release of a claim for personal injuries, since the releasee is not responsible for the representations and advice of such physicians."

Illustrative of the principal announced in the foregoing text is the cited case of **Colorado Springs & Interurban Ry. Co. v. Huntling** (Sup. Ct. of Colorado), 181 Pac. 129.

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[7] **Quebe v. Gulf, C. & S. F. R. Co.**, 98 Tex. 6, 66 L. R. A. 734, 81 S. W. 20, 1 Ann. Cas. 545; **Gulf C. & S. F. R. Co. v. Huyett**, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669; **Texas Midland R. Co. v. Wilson**, 263 S. W. 1109.

[8] **Alenkowsky v. Texas & N. O. R. Co.**, 188 S. W. 956; **Missouri, K. & T. R. Co. v. Haven**, 200 S. W. 1152; **St. Louis Southwestern R. Co. v. Thomas**, 244 S. W. 839; **El Paso Electric R. Co. v. Cowan**, 248 S. W. 442; **Jones v. Gulf, C. & S. F. R. Co.**, 73 S. W. 1082

In the latter case, the charge of the court referred to misrepresentations of a physician without making it clear whether the reference was to the physician (Dr. Allen) employed by plaintiff or to the physician (Dr. Hanford) employed by defendant. The court held:

> "If the physician referred to is Dr. Allen, then no advice given by him and no reliance placed upon his representations can form any basis for the recovery, **because he was her physician, and for his representations and advice the company is not responsible.**" (Emphasis supplied).

Similarly here, "no advice given by Dr. Curb and no reliance placed upon his representations can form any basis for a recovery, because he was respondent's physician, and for his representations and advice petitioner is not responsible."

POINT II.

The charge of the trial court permitting the release to be set aside if Dr. Curb was acting for either or both parties was erroneous and was not a submission of petitioner's requested charge that if Dr. Curb was respondent's physician and not the agent of petitioner, the release could not be set aside because of statements made by him. (Germane to Specifications 4 and 5).

Summary of Argument

Petitioner's defense to this action was based upon the release executed by respondent and his wife. Petitioner's motion for an instructed verdict having been overruled, petitioner requested the court to charge the jury that the release could not be set aside because of any statements

of Dr. Curb if the jury found that Dr. Curb was respondent's physician and not the agent of petitioner. This charge was refused and instead the court instructed the jury that if it believed Dr. Curb's statements were untrue and if it further believed that Dr. Curb was acting "for either or both parties in this transaction," the release could be set aside. Thus the jury was instructed that the release could be vitiated if Dr. Curb was acting for petitioner or for respondent or for both petitioner and respondent. This was the equivalent of instructing a verdict for respondent if Dr. Curb's statements were incorrect, without regard to petitioner's responsibility for such statements.

Argument

In its motion for an instructed verdict, petitioner, after pointing out that the representations of Massey, being an accurate repetition of the opinion of Dr. Curb, could not be made the basis of fraud, stated specifically (R. 603):

> "Moreover, the representation of Dr. Curb cannot be the basis of setting aside the release and check, on the ground of fraud, for the reason that said representations or opinions expressed by Dr. Curb were made by the plaintiff's own physician and agent and not by an agent or representative of the defendant."

Petitioner's motion for an instructed verdict having been overruled, petitioner requested in writing the following special charge (R. 612):

> "Gentlemen of the Jury:
>
> "If you find from the evidence that prior to the settlement Dr. Curb stated that Mrs. Buchanan's injuries were not as great as they really were, and you further find that plaintiff believed the statement of

> the doctor to be true, and relied thereon; nevertheless, if you further find that Dr. Curb was a physician of Mrs. Buchanan's own choice, and not the agent or employee of the defendant, the release and draft endorsement are binding on plaintiff and you should find for the defendant and so say by your verdict."

In charging the jury with reference to the statements of Dr. Curb, the only instruction undertaking to deal at all with the matter of Dr. Curb's agency is contained in the following quotation from the court's charge (R. 608):

> "(If) you further believe that this doctor was acting not merely for plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent and conveyed to the plaintiff were not true, * * * then he may recover."

Under this charge the jury was instructed that if the doctor was acting for "both parties," respondent could recover, and that if the doctor was acting for "either" party, respondent could recover. In other words, the trial court charged the jury **that respondent could recover if the doctor was the agent of petitioner, and that respondent could recover if the doctor was the agent of respondent, and that respondent could recover if the doctor was the agent of both parties.** This is perhaps as grave a misstatement of law as can be conceived.

The jury was given no charge denying respondent the right to recover if it found that Dr. Curb was not the agent of petitioner. In its specially requested charge, petitioner asked the court in plain, unambiguous words to instruct the jury that if Dr. Curb was respondent's own physician and was not the agent of petitioner, the release could not be set aside because of any statements of Dr.

Curb. If there was any evidence in the first place justifying the submission of the case to the jury upon the ground of fraud by Dr. Curb, this requested charge presented petitioner's principal, if not sole defense thereto; but such defense was never submitted to the jury.

It is possible that the trial court started out upon the charge in question with the thought of instructing the jury that if Dr. Curb was acting for respondent alone, respondent could not recover. This thought, if present in the court's mind, was immediately negatived by the instruction that if Dr. Curb was acting for either party, respondent **could** recover. But even if, for the sake of analysis, the words "either or" be treated as stricken from the charge so that the charge would have read: "If you believe that this doctor was acting not merely for plaintiff alone, but for * * * both parties in this transaction * * * then plaintiff may recover," such charge would still be utterly erroneous and a judgment based thereon could not stand. A contract or agreement cannot be abrogated by one party thereto because of the alleged fraud of an agent who has acted for both parties in the transaction. This rule is followed by the courts of Texas,[9] and we know of no jurisdiction which does not adhere thereto. The principle is recognized by the Supreme Court of Missouri in the case of **Fuchs, et al. v. Leahy,** 9 S. W. (2d) 897, which

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[9] **Goodwin v. Daniel, et al.,** 93 S. W. 534 (Texas—Writ of Error denied by the Supreme Court);
Blair v. Baird, 94 S. W. 116 (Texas—Writ of Error dismissed);
Austin, et al. v. Rupe, et al., 141 S. W. 547 (Texas—No writ applied for).

quotes with approval the doctrine as stated in 2 **Mechem on Agency** (2nd Ed.), Section 2140:

> "The (common agent) owes no more duty to one than to the other; each one of the principals is under an equal duty to supervise the agent and to protect his own interest, and there is no reason why the misconduct of the agent should be imputed to one principal rather than to the other."

But the trial court (even if we strike the words "either or" from the charge) did impute the conduct or statements of Dr. Curb to petitioner rather than to respondent when he charged that if Dr. Curb was acting for both parties, petitioner would be responsible for his statements and respondent could recover from petitioner. This was error.

But we cannot strike the words "either or" from the charge. "Either party" clearly meant petitioner or respondent, since they were the only parties involved. So that, instead of being instructed as requested by petitioner that the release could not be set aside for mis-statements of Dr. Curb if he was respondent's doctor and not the agent of petitioner, the jury was charged to find fraud on the part of petitioner operating to vitiate the release if Dr. Curb's statements were incorrect, even though Dr. Curb was respondent's physician, and was in no sense the agent of petitioner.

It is obvious that in setting aside the settlement agreement and awarding additional damages, the jury decided that Dr. Curb had underestimated the extent of the injuries. This is true whether the jury had in mind the opinion given by Dr. Curb directly to respondent or the same opinion given to respondent through Massey. The jury may have felt that if respondent was misled by Dr.

Curb's opinion, he should recover whether Dr. Curb was employed by and represented respondent or petitioner. It was therefore the duty of the trial court to make clear to the jury that if it believed respondent was misled by Dr. Curb's opinion, nevertheless respondent could not recover **if Dr. Curb was the agent of respondent and not of petitioner.**

Under the law of Texas, petitioner had the right to have its defense submitted affirmatively.[10] Its requested charge embodied its defense, simply and clearly. But the charge of the court not only failed to submit such defense affirmatively, **it failed to submit it at all.**

With the charge of the trial court in front of him, no conscientious juror could have done other than return a verdict for respondent if he believed Dr. Curb had underestimated the extent of injuries, regardless of his belief concerning Dr. Curb's agency. The court might just as well have charged the jury: "if you find the injuries sustained to have been greater than estimated by Dr. Curb, you will return a verdict for respondent." This would have ignored petitioner's defense based upon the settlement agreement. That is exactly what the court's charge as given did.

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[10] **M. K. & T. Ry. Co. v. McGlamory, et al.,** 89 Tex. 635, 35 S. W. 1058;

Fox v. Dallas Hotel Co., 111 Tex. 461; 240 S. W. 517.

Dallas Ry. & Terminal Co. v. Ector, 116 S. W. (2d) 683 (Texas Commission of Appeals): "The principle governing these decisions is the same as that governing the rule that the defendant is entitled to an affirmative presentation of his defenses. With respect to this valuable right of the defendant no distinction has been made between cases submitted on general charges and those submitted on special issues" (Emphasis supplied).

POINT III.

The Circuit Court, in affirming the judgment, based its action upon a misconstruction of the charge of the trial court; and since the charge as construed by the Circuit Court was neither raised in the case nor given to the jury by the trial court, the judgment of the Circuit Court is erroneous. (Germane to Specifications 6 and 7).

Summary of Argument

The charge of the trial court was construed by the Circuit Court as instructing the jury that if respondent **believed** that Dr. Curb was acting for both parties and not merely for respondent, the release would be binding, but not otherwise. Such a charge would have **assumed** that Dr. Curb was acting for both parties, without any finding by the jury to that effect. Under such a charge, the case would have turned not on what party Dr. Curb was actually acting for but on what party respondent **thought** Dr. Curb was acting for. No such issue was raised by the pleadings or evidence of either party. The trial court did not so charge the jury at all, but instead charged that the release could be set aside if Dr. Curb was acting "for either or both parties in this transaction." The charge as construed by the Circuit Court was not given, but would have been erroneous had it been given.

Argument

The Circuit Court affirmed the judgment upon the theory that the trial judge charged the jury that if respondent "believed that the doctor (Dr. Curb) was acting not merely for plaintiff alone but for both parties, he

would be bound by the release" (R.701, Opinion of Circuit Court). The Circuit Court held that such charge correctly stated the law of Texas governing the case, and that petitioner's special requested charge "was covered by the general charge."

Petitioner submits, respectfully but deliberately, first, that the trial judge did not so charge the jury; second, that such charge, had it been given, would not have correctly stated the law governing the case; and third, that such charge, had it been given, would not have covered petitioner's special requested charge.

Of course if such a charge as described by the Circuit Court was not given by the trial judge, the second and third suggested propositions become purely academic, except as they further demonstrate that the opinion of the Circuit Court did not really deal with this case at all.

That part of the charge of the trial court involved here and the Circuit Court's construction thereof are for convenience and clarity set down opposite each other immediately hereunder:

The trial court:

"If the minds of the parties met and he understood at the time he signed it that his doctor had represented that his wife should be up and not in bed, and you further believe that the doctor was acting not merely for the plaintiff alone, but for either or both parties in this transaction, * * * **then he may recover.**"

The Circuit Court:

"In substance, the Judge charged the jury that if the minds of the parties met at the time Buchanan signed the release and he believed that the doctor was acting not merely for plaintiff alone but for both parties, **he would be bound by the release.**"

The trial court thus charged the jury that respondent **could** recover if the "doctor was acting not merely for the plaintiff alone, but for either or both parties." The Circuit Court states that the jury was charged that respondent **could not** recover if respondent believed that the "doctor was acting not merely for plaintiff alone, but for both parties." To whatever extent the charge given and the Circuit Court's construction thereof bear any relation to each other, they come close to being exactly opposite. Actually, however, they bear little relation to each other.

There is a general rule of law, applicable to some situations (but not to this one), that if an agent has represented both parties to an agreement, and if the party who seeks to avoid the agreement **knew** that the agent represented both parties, then such party cannot have the agreement set aside on the ground that his agent also represented the other party. The corollary of the rule is that if the agent represented both parties without the knowledge of one of the parties, such party may avoid the agreement. This is the rule that the Circuit Court obviously had in mind.

However interesting such rule may be as a matter of abstract law, it has no application to this case. There is no allegation or suggestion in respondent's petition (R. 1-25) that Dr. Curb was the agent of both respondent and petitioner, and that respondent did not know that Dr. Curb was the agent of both; and there is no allegation or suggestion in petitioner's answer (R. 26-32) that Dr. Curb was the agent of both parties and that respondent **did** have knowledge of a joint agency.

No evidence was offered by either side tending to disclose respondent's knowledge or belief concerning Dr. Curb's agency. Respondent was not asked whether he believed that Dr. Curb was acting for respondent alone, or whether he believed that Dr. Curb was acting for both parties; and no circumstance in the record is recalled that would have aided the jury in returning a verdict based upon such a charge had it been given.

Petitioner was given no opportunity to offer a defense to the theory that the release would not be binding if respondent believed that Dr. Curb was acting for respondent alone, because such theory was never advanced by respondent either by means of pleading or proof. The theory was not raised or mentioned in the brief of either Appellant or Appellee filed in the Circuit Court.

If such theory had been raised by pleadings, and if it had been supported by any evidence, and if it had been contained in the trial court's charge, still it would not have submitted or covered petitioner's requested charge nor would it have correctly stated the law governing this case. Had such charge been given, the jury would thereby have been told that the release was binding if respondent believed that Dr. Curb was acting for both parties, but was not binding if respondent believed that Dr. Curb was acting for respondent alone. Such theoretical charge does not ask the jury to determine what party Dr. Curb was acting for (as requested by petitioner), but only what party or parties respondent **believed** Dr. Curb was acting for. It thus assumes, wholly without warrant, that the evidence established as a matter of law that Dr. Curb was **not** acting for respondent alone—for obviously if he was acting

for respondent alone, respondent's correct belief that he was so acting would not be ground for setting aside the release. And yet, under the Circuit Court's construction of the charge, the jury would have been required to set the release aside if it found that respondent **believed** that Dr. Curb was acting for him alone, even though such belief was correct. Petitioner submits that if Dr. Curb was acting for respondent alone (which he was), respondent's belief relative thereto was wholly immaterial.

But whether the Circuit Court's hypothetical proposition of law be sound or unsound in theory, it is still purely hypothetical. It was never involved in the case at any time, and was certainly not the charge given by the trial court. The latter instructed the jury that if Dr. Curb was acting for either or both parties, respondent could recover. That is not the law. And the Circuit Court's unbelievably erroneous construction thereof cannot make it the law.

CONCLUSION

The health of respondent's wife at the time of this trial was unhappily quite bad. The physicians who were called to testify by petitioner admitted that she was suffering from a pronounced kidney trouble (R. 418, 447), diagnosed as Bright's disease (R. 411) and a probable early pulmonary tuberculosis (R. 388). There was a conflict in the medical testimony as to whether her condition could have had any connection with an automobile accident, though all agreed that such condition was not good.

But, whether respondent's wife was ill or injured, petitioner was not guilty of fraud in connection with the settlement made herein. The court charged the jury that it

could find petitioner guilty of fraud if Massey's statement as to what Dr. Curb told him was untrue; but there was no evidence that it was untrue, and even respondent did not claim that it was untrue. The court charged the jury that it could find petitioner guilty of fraud if Dr. Curb's statement concerning the injuries was untrue; but there was no evidence that Dr. Curb spoke for petitioner, and even respondent did not claim that Dr. Curb spoke for petitioner.

It is not right that petitioner should thus be condemned for something which it did not do and something which **no one contends that it did.** Petitioner asks only for that equal treatment at the hands of our courts that is guaranteed to everyone. And so petitioner respectfully prays that this Court issue its writ of certiorari so that the judgment below may be corrected.

Respectfully submitted,

VIRGIL T. SEABERRY,

ROBERT G. PAYNE,

Attorneys for Petitioner.

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CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 180

SOUTHWESTERN GREYHOUND LINES, INC.,
Petitioner,

Vs.

A. L. BUCHANAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Thomas L. Blanton,
Attorney for Respondent,
A. L. Buchanan,
Albany, Texas.

OF COUNSEL:
John Matthews Blanton,
Abilene, Texas.
William W. Blanton,
Albany, Texas.

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INDEX

Page

The Opinion of the Court Below 1

Jurisdiction 2

Statement of the Case 2-55

- Fraud Issue Submitted to Jury for Advice 2
- Jury's Finding of Fraud 3
- Rule 8 Prohibits Attack on Charge 3
- Petitioner's Objections to Charge 4-5
- Part of Charge Embracing Sentence Now Objected to 6-7-8
- Admissions made by Dr. D. G. Curb 9-17
- Admissions by Petitioner's Agent, Massey 18-33
- History of Wreck 33
- Occurences Between Wreck and Procuring Statement 33-34
- Respondent's Wife's Condition Before Wreck 34
- Respondent's Wife's Condition Since Wreck 35
- Testimony of Dr. William R. Snow 35-36
- Testimony of Dr. J. R. Dill 36-37
- Testimony of Dr. R. G. Murrie 37
- Admissions by Dr. W. V. Ramsey 37-39
- Petitioner's Fraud Pleaded by Respondent 39-46
- Testimony of Respondent's Wife 46-49
- Testimony of Respondent 49-55

Argument 55-86

Final Remarks 86

Conclusion and Prayer 86-87

Service of Brief Upon Petitioner's Counsel 87

Table of Authorities Cited

Page

Alenkowsky v. Texas & N. O. R. Co., 188 S. W. 956 ... 77

A. L. R., Volume 48, page 1508 ... 74

Austin, et al. v. Rupe, et al., 141 S. W. 547 ... 83

Benson v. Chicago R. I. & P. R. Co., 352 Ill. 195, 290 U. S. 635 ... 67

Blair v. Baird, 94 S. W. 116 ... 82

Brown v. Evans, 17 F. 912, 109 U. S. 180 ... 68

Casualty Reciprocal Exchange v. Bryan, 101 S. W. (2d) 895 ... 62

Colorado Springs & Interurban Ry. Co. v. Huntling, 181 Pac. 129 ... 74,75

Corpus Juris, Vol. 53, Sec. 33, page 1216 ... 56

Corpus Juris, Vol. 53, Sec. 34, page 1217 ... 56

Corpus Juris, Vol. 53, Sec. 38, page 1223 ... 56-57

Corpus Juris, Vol. 53, Sec. 38, page 1224 ... 57

Corpus Juris Secundum, Volume 3, page 192 ... 73,85

Cowan v. El Paso Elec. Ry. Co., 271 S. W. 79 ... 55,62, 64,80

Dallas Ry. & Terminal Co. v. Ector, 116 S. W. (2d) 683 ... 85

Dalstrom v. Northern Pac. Ry., 98 Wash. 390 ... 68

Douda v. Chicago, R. I. & P. Ry. Co., 119 N. W. 272 ... 73

Duncan v. Texas Employers' Ins. Ass'n., 105 S. W. (2d) 403 ... 55,60

Dr. Pepper Btl. Co. v. Rainboldt, 66 S. W. (2d) 496 ... 67

Ells v. Scondrett, 28 F. Supp. 16 ... 66

El Paso Elec. R. Co. v. Cowan, 248 S. W. 442 ... 79,80

Table of Authorities—Continued

Page

El Paso Elec. R. Co. v. Cowan, 257 S. W. 941 80

Farrar, Walton, Administrator, et al. v. John Churchill, Trustee, et al., 135 U. S. 609 73

Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S. W. 517 85

Fuchs, et al. v. Leahy, 9 S. W. (2d) 897 81

Girard v. St. Louis Car-Wheel Co., 46 Mo. A, 79, 84 57

Goodwin v. Daniel, et al., 93 S. W. 534 82

Gulf, C. & S. F. Ry. Co. v. Huyett, 92 S. W. 454 76

H. & T. C. Ry. Co. v. McCarty, 94 Tex. 298, 60 S. W. 429 71

Houston & T. C. R. Co. v. Brown, 69 S. W. 651 77

Houston & T. C. R. Co. v. Bright, 156 S. W. 305 77

International & G. N. Ry. Co. v. Hailey, 9 S. W. (2d) 182, 280 U. S. 558 67

International & G. N. R. Co. v. Shuford, 81 S. W. 1189 55,62

Jones v. Gulf, C. & S. F. Ry. Co., 73 S. W. 1082 81

Kepner v. Cleveland C. C. & St. L. R. Co., 15 S. W. (2d) 825, 280 U. S. 564 67

Lincoln v. Stone, 42 S. W. (2d) 128 68

Lipscomb v. Houston Elec. Co., 149 S. W. (2d) 1042 69

Lynn v. Wright, 18 Texas 337 5

Mechem on Agency (2nd. Ed.), Vol. 2, Sec. 2140 85

Mississippi Ry. Co. v. Lott, 80 So. 277 68

M. K. & T. R. Co. v. Haven, 200 S. W. 1152 78

M. K. & T. R. Co. v. McGlamory, 89 Tex. 635, 35 S. W. 1058 83

Table of Authorities—Continued

Page

M. K. & T. Ry. Co. v. Reno, 146 S. W. 207 65,77

Panhandle & Santa Fe Ry. Co. v. O'Neal, 119 S. W. (2d) 1077 71

Quebe v. Gulf, C. & S. F. R. Co., 98 Tex. 6, 66 L. R. A. 734, 81 S. W. 20, 1 Ann. Cas. 545 75

R. C. L., Volume 23, page 393 74

Rey Famous Players v. Laskey Corp., 30 F. (2d) 402 67

Rickle v. American Car & Foundry Co., 17 F. 912, 109 U. S. 180 68

San Antonio U. & G. Ry. Co. v. Dawson, 201 S. W. 247 67

Sitchon v. American Export Lines, 113 Fed. (2d) 830 70

Smith v. Atchison T. & S. F. Ry. 232 S. W. 290 55,61

Southern Fruit Distributors v. Fulner, 107 F. (2d) 456 66

Sparks v. Dawson, 47 Texas 144 6

Stenton Elec. Mfg. Co. v. Kloxon, 30 F. Supp. 425 66

St. Louis S. W. R. Co. v. Thomas, 244 S. W. 839 79

Terry Shipbuilding Co. v. Odell, 105 S. E. 864 68

Texas Central Ry. Co. v. Neill, 159 S. W. 1180 65

Texas Jurisprudence, Vol. 7, Sec. 16, page 906 55,56

Texas Jurisprudence, Vol. 20, pages 17-19, Sec. 8 72

Texas Midland R. Co. v. Wilson, 263 S. W. 1109 76

T. & N. O. R. Co. v. Hawkins, 112 S. W. (2d) 1107 70

T. & O. R. Ry. Co. v. Rittman, 87 S. W. (2d) 745 67

Texas & N. O. R. v. Thompson, 12 S. W. (2d) 963—59,60

Wells, et al. v. Houston, 69 S. W. 183 58

Table of Authorities—Continued

Page

Williams v. Smith, 7 L. J. C. H. O. S., 129 66

Williston, Law of Contracts:
Volume 3, Sec. 1487 71
Volume 3, Sec. 1491 72

Code

Judicial Code, Sec. 240 (a), Act of February 13, 1925 2

In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 180

SOUTHWESTERN GREYHOUND LINES, INC.,
Petitioner,

v.

A. L. BUCHANAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was rendered on February 24, 1942. It is not yet reported, but may be found at page 698 of the printed record.

JURISDICTION

The jurisdiction of this Court is attempted to be invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Petitioner has not met the requirements of Rule 38, paragraph 5, the opinion of the Circuit Court of Appeals for the Fifth District coming within none of the contingencies enumerated in subdivision (b) thereof, and there being no conflict of decisions.

STATEMENT OF THE CASE

Petitioner's "SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED" covering pages 1 to 10 of its Petition, and referred to and made its "STATEMENT OF THE CASE" in its Brief, is incorrect and cannot be accepted. It is merely an argument untimely presenting conflicting phases of testimony rejected by the jury, making necessary this corrected statement:

The release was set aside because of the bad faith, deceit, and fraud of petitioner's adjuster and claim agent, Frank Massey (R. 521; 526; 527; 528; 532-536). In submitting such issue of fact to the jury, the trial Court ruled:

> "The issue raised was one of fact, and the Court elected to allow the jury to pass on it so as to advise him of their findings.
>
> T. Whitfield Davidson, Judge Presiding."
> (R. bottom 50).

When finally deciding the case, the trial Court had all twelve jurors before him and heard their sworn statements at Fort Worth:

JUROR THOMAS H. SHERMAN STATED UNDER OATH:

"After the jury had determined under the evidence and the Court's charge that the release should be set aside on account of the fraud practiced upon the plaintiff and his wife by the defendant's adjuster, it was then determined by the jury that the plaintiff's wife was seriously and permanently injured * * * * such testimony of Dr. Ramsey in no way influenced the jury, because the jury believed and followed the testimony of Dr. J. R. Dill, Dr. William R. Snow, and Dr. R. G. Murrie." (R. 669).

LYNN L. WILLIAMS, FOREMAN OF THE JURY, STATED UNDER OATH:

"I joined the other jurors in agreeing to set the release aside, because I was convinced by the evidence and the Court's charge that fraud was practiced upon the plaintiff and his wife in obtaining the release, and that the plaintiff was entitled to have the release set aside.

"In all of our deliberations there was no expression of prejudice against, or unfriendliness toward the bus company. At one time ten jurors voted to assess the plaintiff's damages at $25,000, and I agreed with all the members of the jury to fix the damages at $17,500, because I believe that it required that sum to fairly compensate the plaintiff for the serious and permanent injuries his wife sustained in the wreck. The jury followed the instructions of the Court and considered only the sworn evidence and the law the Court gave us in his charge." (R. 669).

RULE 8 PROHIBITS ATTACK ON COURT'S CHARGE

Rule 8 required Petitioner "before the jury retires to state distinctly the several matters of law in such charge to which he excepts." Petitioner did not then make the objection it now belatedly raises. (R. 609-611).

After reading his charge, the Court inquired of counsel if there were any objections to the charge (R. bottom 609), when the following occurred:

"MR. TURNER (Petitioner's counsel):

"Only two brief exceptions, if the Court please. In stating the issues as made by the pleadings I think the Court inadvertently stated that in response to the issue of negligence the defendant said, 'yes,' but that it had been settled.

"Defendant respectfully excepts and submits that the issue is denied by general denial in the pleadings.

"MR. BLANTON:

"But not by the evidence, Your Honor.

"MR. TURNER:

"Defendant respectfully excepts to the law as stated by the Court in his charge with reference to the sufficiency of the burden of proof on the issue of fraud. We understand the law to be that when fraud is charged the burden is more than the mere preponderance of greater weight of credible testimony. We understand the law to be that where a written instrument is signed and attached and sought to be set aside by fraud, that the testimony must not only be of greater weight, but must be clear and convincing and to the satisfaction of the Court and jury.

"THE COURT:

"You call attention to your general denial?

"MR. TURNER:

"Yes, sir.

"The second is with reference to the Court's charge on the burden of proof. I believe your Honor said they should define the issue by the greater weight and degree of credible testimony, and it is our position that with reference to the issue of fraud the jury must be governed by the testimony that is satisfactory and clear.

"THE COURT:

"If you have a charge setting out just exactly what

you desire, the Court will consider it, if you desire.

"MR. TURNER:

"I was just excepting to the Court's charge. We will be glad to do that.

"THE COURT:

"Gentlemen of the Jury, counsel calls the Court's attention to the fact that they do not admit negligence in their pleadings, but they filed a general denial. Whether or not they were guilty of negligence in driving the bus into the rear end of the car, as alleged by plaintiff, and as contended for by plaintiff, is covered by that general denial, and of course you will find whether or not they were guilty of negligence, as other things. The Court is under the impression that they were not raising any issue on that point, but he now submits the question of negligence in that respect.

"On the burden of proof, the Court has told you throughout the case that the burden of proof will be upon the plaintiff. The burden of proof is the greater weight and degree of credible evidence, and that applies to the issue of fraud like any other issue in the case.

"You may now retire with the Marshal and consider of your verdict."

(R. 610-611).

TRIAL COURT FOLLOWED SUPREME COURT OF TEXAS

With reference to Petitioner's contention that a different rule prevailed in the quantum of evidence necessary to establish fraud the Supreme Court of Texas as early as 1857 in the case of Lynn vs. Wright, 18 Texas 337, in its opinion by Mr. Justice Wheeler held:

"There is no such rule of evidence or principle of law, as that, in order to authorize a jury to deduce, from circumstantial evidence, the conclusion of fraud,

the circumstances must be of so conclusive a nature and tendency, as to exclude every other hypothesis than the one sought to be established. If the evidence is admissible as conducing in any degree to the proof of the fact, the only legal test applicable to it, upon such an issue, is its sufficiency to satisfy the minds and consciences of the jury. The question of fraudulent intent is a question of fact, which it is peculiarly within the province of the jury to decide."

In the case of Sparks vs. Dawson, 47 Texas 144, decided in 1877, the Supreme Court of Texas in its opinion by Mr. Chief Justice Roberts reaffirmed said holding as follows:

"There is no fixed definition of fraud. It consists of, and depends upon, the existence of a certain combination of facts in each case. The facts in relation to the misrepresentations made by the defendant, as alleged by the plaintiff in this case, constitute fraud. There is nothing peculiar about them that should require other and different proof to establish the facts which are necessary to constitute a cause of action or defense in any other civil case. Nor is there anything in them which should require any stronger conviction in the minds of the jury of their having been established by the evidence, than that which is required to maintain or defend any other cause of action in civil causes."

PETITIONER MISCONSTRUES CHARGE UPON AN ISOLATED SENTENCE THEREFROM

Sufficient of the charge is now quoted to show the setting of the isolated sentence Petitioner quoted from one paragraph thereof:

"Now, the plaintiff says that he is not bound by that release, for the reason that it was procured by fraud and by fraudulent representations made by the agent of the defendant, for an inadequate considera-

tion, and but for such fraudulent representations the release would not have been signed.

* * * *

"The defendant denies that there was any fraud and says that this contract was deliberately and fairly entered into between the parties, and that they accepted the $50.00 in payment of the injury.

"The burden of proof is upon the plaintiff to establish his right of recovery by the greater weight and degree of credible testimony.

"So now, if you believe from the evidence that about the time charged in plaintiff's petition that plaintiff's wife was injured as alleged therein, plaintiff would be entitled to recover unless he had settled his cause of action. There is in evidence a release which fully releases that cause of action and therefore you will find for the defendant unless you find and believe that that release was procured by fraud and misrepresentation. Now, that fraud and misrepresentation need not be wilful or intentionally made; it is sufficient if the statements made were untrue. The statements relied upon by the plaintiff in part are to the effect that while she, plaintiff's wife, was sick, and about the fourth day after the injury, that the defendant's agent, Massey, called upon her and stated in part to her that, 'I am surprised to find you in bed, from what your doctor has said about you I would have imagined that you would be up from your injuries; that your injuries are not permanent and that you should be up and well in a short time.' The testimony on that point is before you and you have heard it and listened to it. Now if the statements made by the agent were true, then the plaintiff could not recover, if they were untrue, and the plaintiff was induced to sign the release and to part with a property right, or a chose in action, by virtue of the untrue statement, then he may recover, and it matters not whether it was innocently made or not, if it was untrue.

(PETITIONER TOOK THE SENTENCE IT NOW OBJECTS TO FROM THE SUCCEEDING PARAGRAPH OF THE CHARGE):

"In making contracts the minds of parties must meet; that is they must each understand what they are about, and one of them parts with certain rights and the other surrenders certain rights, and that amounts to a contract. In this case the defendant is alleged to have parted with $50.00 and I believe $11 doctor bills, and the plaintiff is alleged to have parted with his right to a lawsuit, his right to a chose in action against the defendant whom he alleges had injured his wife. If the minds of the parties met and he understood at the time he signed it that his doctor had represented that his wife should be up and not in bed, and you further believe that this doctor was acting not merely for the plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent, and conveyed to the paintiff were not true, but were made to induce him to make the settlement, and that he acted upon them and that a man situated with the environments and conditions in which the plaintiff was situated and in which the defendant saw him situated, would have, in the exercise of ordinary prudence and judgment, acted as he acted, and relied upon the statements, then he may recover. If he did not believe them then he could not recover, but if he believed them and relied upon them and they were untrue, and were made by the claim agent to mislead plaintiff, then you may find for the plaintiff.

* * * *

"Now, if you find for the plaintiff, and that the release was procured by fraud, then you may further consider the extent of the plaintiff's damages. If you find that there was no fraud, then you need not consider the question of damages, but just simply find for the defendant."

(R. 606-609).

DR. CURB WAS NEVER EMPLOYED BY RESPONDENT OR HIS WIFE AND DID NOT LOOK TO THEM FOR PAY

DR. D. G. CURB testified that he had never met Mrs. Buchanan until she was brought into his office on the night of January 7, 1939, (R. 452); that he visited her the next morning (Sunday) at the Brice home and saw her no more until (long after the release was executed) she came by his office on her way home. (R. bottom 469); that he first charged her doctor's bill to Jack Brice, but after the company's agent, Mr. Massey, came to see him and told him the Company would pay it, he then looked to the Company for it. (R. lower part 472); Dr. Curb had seen her only twice when Petitioner's Claim Agent, Frank Massey, prepared the typewritten statement for him to sign on Monday, January 9, 1939, following the wreck Saturday night. (R. bottom 394 and top 395); and when asked about the typewritten statement Petitioner's Claim Agent prepared and had him sign on Monday, January 9, 1939, Dr. Curb testified:

> Q. Doctor, if he wanted a statement from you why didn't you sit down and write him out one yourself; why did you let him write it?
>
> A. Well, sometimes I write them and sometimes these adjusters will have the typewriter in, set it down there and say well, you tell so and so, so and so you tell me what to write and I will write it out.
>
> Q. And you left it up to the adjuster to write out the statement for you?
>
> A. Yes. If they want to write it, I will tell them what to write and read it over and if it looks all right I will sign it.
>
> Q. You knew that you were looking to him for the

pay, didn't you? To the company, for the pay, didn't you?

A. Yes. I think he told me. I wouldn't be sure but I think he told me before that his company would—

Q. (Interrupting). Would pay it?

A. Yes, would pay her doctor bill.

Q. And in these other cases you made out to the adjustors you looked to the company for your pay?

A. They usually paid the doctor bill.

(R. 395).

DR. CURB admitted that Petitioner employed him to make the report and paid him $3 for it, and that he did not mention in such report definite information he had obtained from Respondent's wife the preceding day about serious injuries to her pelvic region:

Q. This is addressed to the Southwestern Greyhound Lines, Fort Worth. You put down there, bill to date, $8.00?

A. Yes.

Q. And then on the 11th they paid you $11.00; they paid you $3.00 for making this statement, didn't they, Doctor?

A. Well, I don't remember whether that is right or not. If you want me to I would not mind in the least telling you what the usual custom is with these companies.

Q. What is the usual custom?

A. The usual custom—

Q. (Interrupting). These different companies that you make statements to where they have an accident?

A. They usually pay the doctor two or three dollars for his time in giving these things.

(R. 397).

Q. Did Mrs. Buchanan complain to you of having her right upper leg and hip being blue and bruised and her left upper leg sore?

A. She complained of that when I went up to the house to see her.

Q. That was on the 8th, the next day after the accident, Sunday, you said, I believe you testified that you went up there the morning after you dressed her scalp that afternoon?

A. Yes.

Q. And on that morning she complained to you about having, what did you say about it?

A. Bruises and aching and stiffness.

Q. Around her pelvic region?

A. Generally all over her body.

Q. Didn't she specifically, (say) around her pelvic region?

A. Possibly she did around her hips, I would not say she did not.

Q. Then the next day when you gave Mr. Massey this statement you didn't mention anything about complaining of pain and bruises around her pelvic region, did you?

A. I had no particular reason. I was not trying to conceal anything.

Q. I understand that, but you didn't mention that in your statement, did you?

A. No, I mentioned in the statement what I could see when she came in the office, that night, after the wreck. (R. 398-399).

Q. You have been the examiner for a lot of defendants in damage suits, damage suit cases, haven't you Doctor, where there have been accidents in wrecks, haven't you?

A. Yes, sir, I have.

Q. And they paid you fees for your services, haven't they?

A. Yes, sir, they always have.

Q. And you were not served with any process of the Court to come from your home and office in this case from a woman who was going to have a baby, over here to the Federal Court in Abilene today, were you, you were not summoned by the Marshal to come over here?

A. No, sir.

Q. You came here at the request of this bus company's lawyers?

A. Yes, sir.

Q. Came voluntarily?

A. Yes, sir.

Q. And you stood in readiness before this Court adjourned last October, you stood in readiness to come whenever they phoned you, didn't you?

A. Well, yes, sir.

Q. They had made arrangements with you to come?

A. Yes, sir.

(R. 454).

EMPLOYED BY PETITIONER, DR. CURB AIDED THE DEFENSE IN EVERY WAY POSSIBLE

Dr. Curb admitted that at the Bus Company's request he had left a sick patient at Albany, a woman who was to have a baby, and without process, had come into another county to give testimony for appellant. (See above).

Dr. Curb admitted that on Monday morning, after the wreck Saturday, he knew the company would pay his bill, before Massey secured the release Wednesday:

Q. You charged Mr. Brice with this Doctor bill?

A. Yes, sir.

Q. Is it not a fact that you looked to the company to pay it and the company's agent, Mr. Massey, told you they would pay the doctor bill?

A. After he came to see me he said they would. (R. 472).

Q. You then knew and understood the company would pay these doctor's bills, didn't you, that is the reason you stated what your bill was?

A. Yes, sir. (R. 473).

Dr. Curb admitted that he made no verbal statement to appellant's adjuster outside of the written statement said

adjuster had prepared to suit the necessities of his company, and into which some things he knew did not go:

Q. Did you make a statement to Frank Massey verbally outside of this written agreement you let him draw up on the typewriter?

A. No, sir.

Q. You did not tell him anything about she having complained to you the day before of being pained and aching all over her body generally, did you?

A. She complained of soreness and stiffness. (R. 482).

Q. There were some things when you were talking to him about complaints made, there were some things, by not stating them all that were concealed?

A. Never knowingly concealed anything. (R. 483).

Q. And the company paid you?

A. Yes, sir.

Q. And then you had discussed this matter with Mr. Massey before the 11th, this matter of bill, hadn't you?

A. He wanted to know what my bill would be up to that date.

Q. Then you had discussed the matter of your bill on the 9th when he drew this statement up?

A. Yes, we talked about what the cost would be.

Q. He paid you a check on the 11th?

A. Yes, sir.

(R. 489-490).

Dr. Curb admitted that appellant's adjuster Massey parked his car in front of his office and made his office headquarters:

Q. Is it not a fact that Frank Massey had at the time he was there on the 11th of January, 1939—had his car parked in front of your office and making your office headquarters?

A. He parked his car there. (R. 490).

Dr. Curb admitted that appellant's adjuster had him to act as a flunky for him in procuring a Notary to clinch

his release.

Q. Is it not a fact when he went up there to get this release signed by Mrs. Buchanan he came to your office and you made arrangement with Frank King to go up there?

A. Yes, I did, he asked me if I could refer him to a notary.

Q. You got Frank King for him?

A. Yes, sir.

Q. And you were doing all of those things to help this company, weren't you?

A. Just doing a little favor, that is all he asked me, to get him a notary. (R. 490).

PETITIONER EMPLOYED DR. CURB TO EXAMINE RESPONDENT'S WIFE IN JULY, 1940

Q. When this lady came around to your office on July 2, 1940, during the trial of the case at Albany, you knew that this bus company, these bus company lawyers had asked that she be sent there, didn't you, they told you she would be there?

A. Yes, sir.

Q. And that they wanted you to examine her?

A. Yes, sir.

Q. And when you began to ask her questions, what did she tell you, when you say you asked her which toe hurt her; she did not tell you she did not know which toe hurt her, she told you she could not tell you because her lawyer told her not to talk?

A. Yes, sir.

Q. Is it not a fact you asked me if I had instructed her not to talk, and didn't I tell you in substance that I had, because I did not want you misconstruing what she told you and have you contending that she told you one thing when she contended that she told you another?

A. Yes, sir.

Q. I told you I thought it best for her not to talk to you at all, didn't I?

A. Yes.

Q. In view of the fact that you were the bus company's doctor, didn't I—

MR. SPRINGER: (Interrupting) That is a conclusion whether or not he was the bus company's doctor.

(R. 455).

Q. I told you at that time over the telephone that you could examine Mrs. Buchanan in every way that you wanted to, didn't I?

A. Yes.

Q. And she told you you could examine her in every way you wanted to, didn't she?

A. Yes, sir.

Q. And you did examine her in every way you wanted to?

A. Yes, sir. (R. 457).

Q. You found that lady in an extremely nervous condition?

A. Extremely nervous on the day I examined her.

Q. And you found her on July 2, 1940, you found her skin hot and dry, didn't you?

A. Yes, sir.

Q. That was not normal?

A. No. sir.

Q. You found that she had a temperature higher than normal?

A. Yes, sir. (R. 458).

Q. That was not natural, was it?

A. No, sir.

Q. That was abnormal, wasn't it?

A. Yes, sir.

Q. That skin being hot and dry was not normal to a young person in good health, was it?

A. It was abnormal.

Q. You found quite a substantial distinct evidence of albumen in her urine, didn't you?

A. Yes, sir.

Q. Whenever a doctor finds albumen in urine he immediately looks for injury to kidneys, doesn't he, isn't that naturally their experience, Doctor?

A. You suspect that there is a possibility or probable inflammation of the kidneys, yes.

Q. That is what you would ordinarily expect?

A. That is what you think about first, yes.

(R. 460).

Q. That substantial evidence of albumen in her urine was not normal to a young girl 25 years of age in good health?

A. No, sir.

Q. It was abnormal?

A. Yes, sir.

Q. You testified that her hemoglobin test was 70?

A. Yes, sir. (R. 461).

Q. And you testified that for her age the normal was:

A. 85 to 98.

Q. Then, Doctor, was it normal for her at 70?

A. No, sir.

Q. It was abnormal?

A. Yes, sir.

Q. You found infiltration in both lungs?

A. Yes, sir.

Q. There was distinct infiltration, was there?

A. Rather clear to me, yes, sir.

Q. And was that normal in a young woman in good health, 25 years of age?

A. I would not consider it normal.

Q. It was abnormal?

A. Yes, sir. (R. 462-463).

Q. You found some bronchial affection there, didn't you, from your X-ray picture?

A. Yes, sir.

Q. Was that normal or abnormal?

A. I say it is abnormal.

Q. That is not normal for a young woman of her age in good health?

A. No, sir.

Q. Where there is albumen in the urine and no casts, but later casts developed, what does that mean to an experienced doctor?

A. That would indicate inflammation of the kid-

ney.

Q. And it indicated a progressive nature of that condition, doesn't it?

A. Yes, sir.

Q. That is a natural progression, the casts are an indication of albumen in the urine?

A. Yes, sir.

(R. 464).

Q. It is a fact, is it not, that a person in an automobile, where an automobile is knocked off of the pavement and down the road some distance and into a ditch and against an embankment and causes a person to be unconscious for more or less time, it is a fact that they can get broken bones from it?

A. Yes, sir.

Q. And they can get a broken pelvis from it?

A. Yes, sir.

Q. It is possible for them to get a disturbed kidney condition, a displaced kidney?

A. It is possible.

Q. It is possible for them to get a diplaced uterus, is it not?

A. It could be possible if it was severe, if the injury was severe enough or they could scratch something and disrupt the internal organs.

Q. Suppose an automobile hit from behind by a 16,000 pound Greyhound Bus, 33-passenger bus, and knocked over 100 feet down the highway and off of the highway into a ditch and up against an embankment, such that it knocked both the driver and passenger unconscious for a little while, couldn't that cause a displaced uterus?

A. Yes, it could cause injuries.

Q. Any injury to the uterus, any traumatic injury to the uterus that is severe enough could cause abnormal menstruation, couldn't it?

A. Yes, it could if real severe.

(R. 476-477).

PETITIONER'S CLAIM AGENT, FRANK MASSEY, ADMITTED HIS BAD FAITH, AND THAT HE TOOK ADVANTAGE OF RESPONDENT'S CREDULITY.

Q. Mr. Massey, when you came to Albany on the night of January 7, 1939, following this wreck, you came over there as the adjuster for this bus company, didn't you?

A. Yes, sir.

Q. You were their adjuster?

A. Yes, sir.

Q. And you came over there to try to investigate and get evidence for the bus company, didn't you?

A. Yes, sir.

Q. Got statements from various parties, didn't you?

A. Yes.

Q. Had the bus left Albany then for Fort Worth?

A. No, sir.

Q. The bus was still being held, was it not?

A. Yes, sir.

Q. And had instructions to wait until you came?

A. Yes, sir.

Q. And after you got there you did hold the bus until you took statements from a lot of passengers, didn't you?

A. Oral statements.

Q. You got the names and addresses of various ones and various things from them?

A. Yes, sir.

(R. 521).

Q. It was one of these big Greyhound passenger buses?

A. It was the older type with the engine sticking out in front.

Q. One of those big ones?

A. Yes, sir. (R. 522).

Q. How many of those passengers have you got here as witnesses now?

A. I do not have any.

Q. Don't have any of them, do you?

A. No, sir.

Q. Didn't you go back and report to the man who sent you?

A. He was with me.

Q. He was with you all the time.

A. He was with me that night going over and coming back.

(R. 523).

Q. Mr. Massey, you went back to Albany on Monday morning, January 9, 1939, didn't you, that is the day you took Dr. Curb's statement?

A. Yes, sir.

Q. Before you saw any of the Buchanans you went to Dr. Curb's office and had a talk with him, didn't you?

A. Any of the Buchanans, yes, sir.

Q. And while there you got Dr. Curb's letterhead with his name on it, office and telephone, etc., and on a typewriter you wrote that statement for Dr. Curb to sign, didn't you?

A. Yes, sir.

Q. Now this statement, which is Defendent's Exhibit No. 9 signed by Dr. Curb on his letterhead on January 9, 1939, you wrote every bit of it, didn't you?

A. Yes, sir.

Q. And you put in there what you thought was material to your company, didn't you?

A. Yes, sir.

Q. And you were not looking after the Buchanan's interest, were you?

A. No, sir.

Q. Was anybody there to look after their interest?

A. No.

Q. You were looking after your bus company's interest?

A. Yes, sir.

(R. 526).

(PETITIONER'S CLAIM AGENT KNOWINGLY PREPARED AND GOT DR. CURB TO SIGN FALSE STATEMENTS AS TO HOW CRASH OCCURRED):

Q. You knew Dr. Curb had not been out there at the scene of the wreck that night, didn't you?

A. He told me he had not.

Q. All right, you had him make this statement: "Mrs. Buchanan was riding in the car with Mrs. J. T. Brice, and came upon the scene of the accident, which necessitated the stopping of the car on the highway."

(Car did *not* stop)

You wrote that in there, didn't you?

A. Yes, sir.

Q. You put that in there, didn't you, for him to sign?

A. Yes, sir.

Q. And you knew he didn't know anything about what happened, didn't you, of his own knowledge?

A. Of his own knowledge, yes.

Q. And then you had him put this in there:

"The bus came along and on account of the fog, etc., ran into the rear of the car knocking it into the ditch."

You wrote that in there?

A. He had me put it in there.

Q. Didn't you just state that you knew he did not know anything about what happened out there of his own knowledge?

A. Yes, sir.

Q. Then you wrote this statement in there as his medical opinion, didn't you?

"Outside of general soreness, there should be no disability as a result of injuries. Complete recovery expected within two weeks following date of accident."

(R. 527).

You wrote that in there for him to sign?

A. Yes, sir.

Q. When did you first meet her?
A. Shortly after I secured that report.
Q. How shortly afterwards?
A. Within an hour and a half or two hours.
Q. On the same day?
A. Yes, sir.
Q. You knew that her husband was in Rising Star when you went into her room?
A. Yes, sir.
Q. You knew she was sick in bed?
A. Yes, sir.
Q. Did you get permission from her husband to go in her bedroom while she was in bed and get a statement from her?
A. No, sir.
Q. You went in there without getting permission?
A. From him, yes.

(R. 528).

Q. You wrote that in there that the bill to date was $8.00 and had Dr. Curb sign that as a statement?
A. Yes, sir.
Q. And you wrote on your typewriter, addressing this report to your company, Southwestern Greyhound Lines, Inc., at Fort Worth, Texas?
A. Yes, sir.
Q. This report to them?
A. Yes, sir.

(R. 529).

Q. Mr. Massey, do you say that you read this statement of Dr. Curb's to Mrs. Buchanan on that Monday, an hour and a half after Dr. Curb signed it?
A. I either read it or handed it to her.
Q. What was your purpose in reading it to her?
A. Well, when I asked her to tell me what her injuries were and where they were, I was surprised that she had more injuries than Dr. Curb had told me about.
Q. She did tell you of a number of injuries that she had and that Dr. Curb did not tell you about?
A. Yes, sir.

Q. You were surprised at that?

A. Yes, sir.

Q. Mr. Massey, is it not a fact that when you first entered this woman's room when she was sick in bed there, that you told her that you were, in substance, that you were surprised to find her in bed, that you had just come from a conversation with Dr. Curb?

A. Yes, sir.

Q. And did you tell her that Dr. Curb had told you she was not seriously injured but would be all right in a few days, or in words to that effect?

A. That in general, yes.

Q. What was your purpose in telling her that?

A. Well, I was surprised that she was in bed, and when I showed her the report she explained to me and told me that she was more seriously hurt than the doctor evidently was assuming, and told me how badly she was hurt.

Q. And you wrote down the statement for her to sign, didn't you?

A. Yes, sir.

(R. 532).

Q. You wrote every word of that on your typewriter sitting in her bedroom when she was in bed?

A. Yes, sir.

Q. And her husband was not there?

A. No, sir.

Q. And in this statement, you wrote down there at the time as to what—how she claimed she was injured then. It says:

"I got a cut on my forehead between the eyes, my neck sprained and down in between my shoulders, a bruise on my right elbow on the inside, my right upper leg and hip is blue and bruised, my left upper leg is sore, both my knees skinned and my right ankle sprained and my big toe is sprained and swollen."

A. Yes, sir.

Q. You wrote all of that yourself?

A. Yes, sir.

Q. And you were writing this statement in the interest of your company, weren't you?

A. Yes, sir.

Q. The bus company?

A. Yes, sir.

Q. And for the benefit of your bus company?

A. Yes, sir.

Q. You were there as adjuster to get everything you could for your bus company?

A. Yes, sir.

Q. You knew she was sick in bed?

A. Yes, sir.

(R. 533).

Q. She told you then she was in pain?

A. Yes, sir, her neck hurt.

Q. You put down only what you thought your company wanted, didn't you?

A. Yes, sir.

Q. Did you ever take this statement back to Dr. Curb and show it to him before the 11th, before Wednesday?

A. No, sir.

Q. You did not?

A. Yes, sir.

Q. Did you ever go back to Dr. Curb and say, Dr. Curb, that woman up yonder claims she was hurt in a whole lots of ways more than you told me in your statement, did you go back and tell him that?

A. I do not recall such.

Q. You didn't do that?

A. I do not think so.

Q. Up to this time when you were there and told her about what Dr. Curb told you about her not being hurt seriously, that she would be all right in a few days, up to that time had she ever filed any complaint against your company for damages?

A. No, sir.

Q. Had Mr. Buchanan ever filed a claim for damages?

A. That is which day?

Q. Up to that Monday?
A. No, sir.

(R. 534).

Q. Mr. Massey, did Buchanan ever file a claim against your company, a written claim?
A. No, sir.
Q. Up to the time you came in that Brice shop on Wednesday, January 11, 1939, had Buchanan ever made a claim to you or your bus company or anybody else for damages?
A. No, sir.
Q. Had his wife?
A. No, sir.

(R. 535).

Q. Now, you were trying to get a settlement as soon as you could for the company?
A. Yes, sir.
Q. You knew this woman had been injured?
A. Yes, sir.
Q. You knew she had a valid claim against the company?
A. Yes, sir.

(R. 536).

Q. You say—you never saw Buchanan, the plaintiff, until Wednesday morning, January 11, did you?
A. No, sir.
Q. Jack Brice, up to the time you made the settlement with him, never had filed any written claim with you for any damages to his wife or his son, did he?
A. Nothing written.
Q. All right, you asked him how much his car was damaged and he told you $213.65. didn't he?
A. No, sir.

(R. 537).

Q. What did he tell you?
A. It was nearly $400.00.
Q. He claimed to you that his car was damaged $400.00, is that right?

A. Between $300.00 and $400.00.

Q. And you finally told him that you would pay him $213.65, didn't you?

A. I think those are the figures.

(R. 538).

Q. What did you pay him $213.65 for?

A. Mr. Massey told me to go ahead and pay him.

Q. Which Mr. Massey?

A. Mr. O. Massey.

Q. Is he with the Bus Company?

A. He is Claim Manager.

Q. Two Massey in one bus company, that is a coincidence?

A. Yes, sir.

Q. He told you to pay $213.65 and settle the car damage?

A. Yes, sir.

Q. You say you separated these amounts, and made $200.00 for Mrs. Brice's injury and $13.65 for the boy. Why did you do that?

A. I do not recall, Judge.

Q. You wanted to cut them off from making claim, didn't you, as an experienced adjuster, you knew they might make claim, didn't you?

A. I have to get everybody's signature that is involved.

(R. 541).

Q. Mr. Massey, you went to Dr. Curb's office after you got the statement from him and went to Brice's residence and got a statement from Mrs. Buchanan, and then you were prepared to take that matter up with Mr. Buchanan, weren't you, when you could see him?

A. Repeat that question, Judge.

Q. Strike it, if you do not understand it. You came to Albany after you talked with Mr. Brice over the telephone on Wednesday morning, didn't you?

A. Yes, sir.

Q. From where?

A. From Abilene.

(R. 543).

Q. Mr. Massey, is it not a fact that at Albany in July, 1940, this year, you testified that you talked to Mr. Buchanan about an hour and a half before you separated for lunch?

A. Yes, sir.

Q. And that you then came back after lunch and resumed your conversation?

A. Yes, sir.

(R. 545).

Q. Mr. Massey, when you first took this matter up with Mr. Buchanan, you told him about what Dr. Curb had said about his wife's condition, didn't you?

A. Yes, sir.

Q. That she was not hurt seriously, but would soon be all right?

A. Yes, sir.

Q. You told him that?

A. Yes, sir.

Q. And told him you wanted him to sign a settlement agreement, didn't you?

A. Yes, sir.

Q. He told you he didn't want to do it, didn't he?

A. Yes, sir.

(R. 546).

Q. Didn't you also testify there that, "That was not agreeable to him so I offered him $50.00 and the payment of his doctor's bill"?

A. I do not recollect, but there was not anything agreeable except that payment of $50.00 and the doctor's bill.

Q. He did not accept the $25.00.

A. No.

Q. You then offered $50.00?

A. Yes.

(R. 548).

Q. What time did you get back from lunch?

A. Must have been about 3:30.

(R. 549).

Q. And you resumed negotiations with him?

A. Yes, sir.

Q. How long did you negotiate with him then, approximately, before you had agreed on a settlement?

A. About twenty or thirty minutes.

Q. Didn't you go immediately with Buchanan to Dr. Curb's office next to the post office where your car was and begin writing this release and checks, and didn't Buchanan go with you?

A. That is probably right.

Q. And didn't you call on Dr. Curb to get you a Notary?

A. Yes, sir.

Q. And he did get Frank King?

A. Yes, sir.

(R. 550).

Q. After you sat in your automobile and wrote these releases and checks, you and Frank King and Mr. Buchanan went up to Brice's residence, didn't you?

A. Yes, sir.

Q. And went up there to get the release signed?

A. Yes, sir.

Q. For your company, didn't you?

A. Yes, sir.

Q. And after you got in there you saw Buchanan go out of that front room into a bedroom, didn't you?

A. I do not recall whether he went out of the room or not.

Q. Don't you know he went after his wife?

A. She was called in by someone.

Q. You know somebody went for her?

A. Yes.

Q. It was five minutes before he got back, wasn't it, with his wife?

A. Not quite that long.

Q. Approximately five minutes?

A. Yes, sir.

(R. 551).

Q. She did not limp to her chair?

A. She limped on that bad foot.

Q. She did have a bad foot?

A. She had a toe swollen up.

Q. How big?

A. It was noticeable.

Q. You could see she had a big toe that was swollen up?

A. Yes, sir.

Q. And you were getting a release from her when you saw her toe swollen up?

A. Yes, sir.

(R. 552).

Q. Did Mrs. Buchanan ever represent to you and claim that her injuries sustained are permanent and progressive and that recovery therefrom is uncertain and indefinite, did she ever tell you that or anything like that?

A. Only as to the little scar right up here.

Q. She did not tell you her injuries were permanent and progressive, did she, that is, getting worse all the time, did she?

A. No, sir.

Q. Did she say anything to you about they were uncertain and indefinite?

A. She said she did not know what they could amount to.

Q. Did she tell you the term, "uncertain and indefinite"?

A. No, sir.

Q. Did Mr. Buchanan ever tell you her injuries sustained were permanent and progressive?

A. He said he did not know.

Q. Did he ever tell you they were permanent and progressive?

A. No, sir.

Q. Did he ever tell you that those injuries were uncertain and indefinite, and used that term?

A. Not those words.

Q. You had this in this printed contract?

A. Yes, sir.

Q. You did that for the benefit of your company?

A. Yes, sir.

Q. Did Mrs. Buchanan ever tell you and represent to you that "she relied wholly upon her own judg-

ment, belief and knowledge of the nature, extent and duration of said injuries and that no representations or statements regarding said injuries or regarding any other matters made by the persons, firms, or corporations who are hereby released, or any person or persons representing him or them, or by any physician or surgeon by him or them employed has influenced her to any extent whatever in making this release," did she tell you to put that in that release?

A. She never told me to put that in.

Q. You put that in yourself?

A. Yes, sir.

Q. Put that in there to protect your company?

A. Yes, sir.

Q. Mr. Buchanan never told you that either, did he?

A. No, sir.

Q. You put that in there to protect your company against him, didn't you?

A. Yes, sir.

Q. Mr. Massey, do you claim that this $11.00 covers Doctor Curb's bill for Mrs. Brice?

A. I do not recall, Judge.

Q. Will you claim that?

A. I will not claim it, no.

(R. 554-555).

Q. You have had wide experience in adjusting claims for damages in accident cases, haven't you?

A. About seven years.

Q. But you have had wide experience, haven't you?

A. Well, according to the viewpoint, I of course think it is pretty wide.

(R. 556).

Q. I am asking you, yourself, are you or not an expert adjuster?

A. I am fair.

Q. What did you do before you went into the business seven years ago?

A. I worked for the United States Government.

Q. You are an expert stenographer?

A. I was when I got out of school.

(R. 557.)

Q. Mr. Massey, referring to the statement that you wrote out and had Mrs. Buchanan to sign on Monday, January 9, 1939, two days after the wreck, in reply to question asked by defendant's counsel, you stated that you merely acted as a stenographer in taking this statement down: you went up to that house as the adjuster for this bus company, didn't you?

A. Yes, sir.

Q. While you were acting as stenographer you were still acting for the bus company, weren't you?

A. Yes, sir.

Q. You were not acting for anybody else, were you?

A. No, sir.

Q. You said you did not put anything down here except the words that Mrs. Buchanan told you, didn't you?

A. Yes, sir.

Q. You said that several times. Do you mean to tell this jury that Mrs. Buchanan told you at that time that she lived two miles southwest of Rising Star?

A. Yes, sir.

Q. Don't you know as a matter of fact that she does not live southwest of Rising Star but lives northwest of Rising Star?

A. Judge, I do not know where she lives, but at that time, whatever is down there is where she told me she lived.

(R. 565).

Q. You are sure she told you what you put down here, that she lived southwest of Rising Star?

A. Does it say southwest?

Q. Yes, southwest?

A. Yes, sir.

Q. Do you mean to tell the jury that she told you this wreck occurred on Highway U. S. 80-A?

A. Yes, sir.

Q. Don't you know that is the first time she ever went over that road and she did not know whether it was Highway 80 or Highway New Mexico 910?

A. No, sir.

Q. You knew it was U. S. Highway 80?

A. Yes, sir.

Q. Because you had been over it lots of times?

A. Yes, sir.

Q. You put that in there yourself, didn't you?

A. Yes, sir.

Q. Then that is something that you put in there she did not tell you to put in, is it not?

A. No, sir.

Q. You insist she told you that?

A. Yes, sir.

Q. You have got in here that she told you, "We were running with our headlights burning," she told you that, did she?

A. Sure, if it is in there.

Q. Well, it is in there, "We were running with our headlights burning."

A. Yes, sir.

Q. Did you just put that in or did she tell you to put that in?

A. She was bound to have told me.

Q. (Reading) "We were going very slow when suddenly without any warning our car was struck in the rear," did she tell you to put that in there?

A. Yes, sir.

Q. "There were no cars coming toward us on the road and the road ahead of us was clear." Did she tell you to put that in there?

A. Yes, sir, if it is in there.

Q. She told you to put it in?

A. Yes.

Q. "When we were struck our car was swerved to the right and we went right off of the road and into the ditch on the righthand side of the road." Did she tell you to put that in there? And the "bus went straight on down the highway past where we stopped and stopped about two bus lengths east of where we

were." Did she tell you to put that in there?

A. Yes, sir, if it is in there.

(R. 566-567).

Q. If you did not at that time believe that woman was seriously and permanently injured and that her injuries were progressive and that her recovery therefrom was uncertain and indefinite, why did you have them sign a release with this statement in it, that he represented to you, "that her recovery therefrom was uncertain and indefinite," why did you have them sign that kind of a release if you did not believe that her recovery was uncertain and indefinite?

A. Judge, if I just put down what I thought about the injuries I wouldn't have much most of the time.

Q. But you put that in there because you wanted to protect your company from progressive injuries that were uncertain and indefinite, didn't you?

A. It is on the printed form.

Q. You had them sign this kind of a release with that kind of language because you wanted to protect your company from any progressive injuries that were permanent and progressive and where her recovery was uncertain and indefinite, didn't you?

A. I wanted to close the case up definitely.

Q. And that is the reason you had them sign this kind of a release?

A. Yes, sir.

(R. 575-576).

Q. After you had written out these reports and got them signed, I mean these releases, on Wednesday, January 11, 1939, that she was injured in a number of particulars which had not been stated by Dr. Curb, and ask Dr. Curb to reexamine her?

A. I do not recall whether I told him that she had repeated that her injuries were of more serious consequence than his report might have shown, but I do know that I did not ask him for any re-examination; I merely asked him how much his doctor bill was in this case.

Q. That is all you asked him?

A. Yes.

Q. You did not ask him for a re-examination of her, and if necessary call in consultants and find out whether the woman was seriously and permanently and progressively injured?

A. No, sir.

(R. 577).

A WANTON, RECKLESS, INEXCUSABLE WRECK

On Saturday afternoon, January 7, 1939, between 5 and 6 o'clock, on the Highway about 8 miles West of Albany, Texas, where a Chevrolet Sedan driven by Mrs. Brice in which her sister, Azelene Buchanan, Respondent's wife, was riding, was cautiously proceeding along its side of the 20-foot pavement, along each side of which was a 7 foot gravelled shoulder safe for a motor vehicle to travel upon, at a point where the Highway was straight and had no obstruction upon it for more than 200 yards, Petitioner's 33-passenger, 16,000-pound "Greyhound Bus," wholly without warning or excuse, crashed into the rear end of said Chevrolet Sedan, knocked it 39 yards down the Highway, off into a gulley and against an embankment opposite a culvert, and said Greyhound Bus was travelling at such speed that it continued down the Highway to a point 19 yards beyond said culvert before it could be stopped. (R. 63; 69; 119; 122; 131; 163; 598).

When Mrs. Brice regained consciousness, she found Respondent's wife jammed down in the bottom of the car, her knees bleeding, blood running down her front, and mucus coming from her nose. (R. bottom 63). When men from the Bus extricated her from the car and carried her to the steps of the Bus, she vomited and was unconscious. The Bus driver made no offer to take her to a doctor. A stranger came along and carried her to Albany. (R. 64).

She was carried into Dr. Curb's office at Albany, he being one of Albany's two doctors, and laid on the operating table. Her head was bleeding, blood running down her face, her clothes were bloody, her legs and arms were bruised and skinned, she was bruised all over and skinned up, the skin broken. (R. 65; 315). Dr. Curb sewed up the bleeding wound in her forehead and bandaged up her abrasions, but had no X-Ray for examination. (R. 316).

Dr. Curb visited her the next morning (Sunday), at the Brice home, when she complained to him "of having her right upper leg and hip being blue and bruised and her left upper leg sore," and about having "bruises and aching and stiffness generally all over her body and specifically around her hips and pelvic region," (R. 398), and then without seeing her anymore, Dr. Curb the next morning (Monday) allowed Petitioner's Claim Agent, Frank Massey, to prepare a written statement for him to sign, into which said Claim Agent wrote only such things as would benefit his Bus company, (R. 526; 467; 468).

Prior to the wreck, Respondent's wife was a happy young married woman, 25 years of age, weighed 125 pounds, had never had a child, had never been pregnant, had never had a doctor, her menstrual periods had always been regular and had never given her any trouble, she was able to do and did do her cooking, washing, ironing, sewing, house-hold work, canning, looking after her milch cows and poultry, enjoyed having little children around her, was never nervous, enjoyed going to church, dances, parties, and young people's entertainments of all kinds, had normal sexual desires, and enjoyed having normal sexual relations with her husband, and helped her hus-

band generally with his work about the rented farm. (R. 149-151; 156-157; 169; 189).

Following the wreck, her weight by July 2, 1940, had diminished to 99 pounds, and by October 16, 1940, (when she testified) it had diminished to 93½ pounds, she became extremely nervous, unable to control her emotions, crying much of the time, could not bear to have little children around her, was unable to do any of her cooking, washing, ironing, sewing, house-hold work, canning or looking after her cows and poultry, and was never again able to help her husband any with his farm work; her menstrual periods became irregular, flooding constantly through the month; became anemic, had not been able to go to church, or to any party, or dance, or any young people's entertainment; suffered constantly, and had to take aspirin regularly for relief (167-170; 188); she has lost all sexual desire, and such a proposal from her husband is repulsive to her (R. 189).

DR. WILLIAM R. SNOW testified: he made a complete physical examination of Respondent's wife, including a laboratory test and X-rays (R. 245); that resulting from trauma or injury by force, she had a healed scar on the front of her head (R. 246), had extremely active spasticity of muscles of her head, forehead and neck (R. 247), her right pelvic bone was fractured, her left pelvic bone was fractured, with new bone formation thrown out, she had a spasm and tenderness of muscles in her back, and back of the pelvis (R. 249), her cervix or mouth of her womb was bleeding, there was bleeding from her uterus, there were pus cells in her kidneys (R. 250), calculated to be very painful to her (R. 251), such conditions would

"make her very nervous and restless and sleepless, spend sleepless nights, and be in a nervous and upset condition all the time," and certainly would interfere with her normal performance of her normal duties as a farm house wife, and "would weaken her and made her unable to do house work and other work about the place," there was a fracture of the second phalanx of her left foot (R. 252), which "caused a weakness of the arch of the foot, and there was some atrophy of those muscles showing a nerve injury at the point of the fracture of this bone in the foot, which caused severe pain, that her injured instep would produce pain, if she tried to dance or stand on her feet (R. 254), and that in his opinion the wreck caused her injuries (R. 257), that his X-ray pictures introduced in evidence show said fractures (R. 260-261), that she had a second-degree falling condition of the womb, which would cause "pain to the back, and irregular menses and painful menstruation", and there was "marked traumatic injury to that region, that her injuries are serious, definite and permanent, and her pain would continue on as long as she lived," as a result of the wreck (R. 262).

DR. J. R. DILL (her mother's family physician) who had practiced medicine 31 years at Rising Star, testified: that prior to the wreck Respondent's wife had never been sick (R. 225), had never had trouble with her menstraul periods, but had been troubled with them ever since the wreck, which lowered her vitality, helped to make her nervous, and might cause her to have a mental disorder from it (R. 225), and could terminate in tuberculosis (R. 226), and would cause sexual intercourse to become obnoxious to her, and it could eventually bring about an estrange-

ment in her family (R. 227), that her uterus had become enlarged about a third larger than it ought to be, brought about from the accident (R. 237), and that her condition was due to the wreck she was in. (R. 240).

DR. R. G. MURRIE (practiced medicine 33 years in Albany) testified: that in his opinion the injuries and present condition of Respondent's wife were serious and permanent, and were caused by the wreck, and might cause her to have a mental disorder. (R. 304-307).

DR. W. V. RAMSEY testified that he had been employed in quite a number of cases by defendants in accident suits to make examinations for them (R. 419), and that he testified in both Federal and State courts in numbers of damage cases, and that when Petitioner employed him to examine Respondent's wife on October 19, 1940, he had never seen her before, and that he charged a regular fee for such examination (R. 420), and he further testified:

Q. Doctor, since you made this examination, just as soon as you made it you sent a copy of the work you have there to these lawyers?

A. Yes, sir.

Q. Is it not a fact as one of the attorneys for Mr. Buchanan, whose wife you examined, that I requested you to kindly furnish me a copy of that report?

A. Yes.

Q. You refused to do it?

A. Yes.

Q. You did find that this young lady had fever, didn't you?

A. Yes, sir.

Q. She could not have made herself have a higher temperature?

A. No, sir. (R. 424).

Q. And what pulse count?

A. It was above normal.

Q. Then there was an increase over normal from 72 to 99, is that correct?

A. That is correct. (R. 426).

Q. Then she was abnormal on her pulse count from 72 to 99, wasn't she?

A. Yes, sir.

Q. When you felt of her left toe she showed that she had pain there, didn't she?

A. She said she did.

Q. She told you that, did she?

A. Yes.

Q. Doctors depend on what patients tell them about pain, don't they?

A. Yes.

Q. This thyroid part of a person's anatomy, you found that markedly deficient in her?

A. Yes, sir. (R. 427).

Q. When you say markedly deficient, that means terribly out of normal, doesn't it?

A. Well, it would be approximately 20 to 25 below zero.

Q. And you say that to cure that markedly deficient part of her system it requires her to take medicine all the rest of her life?

A. Off and on the rest of her life.

Q. Off and on the rest of her life?

A. That is correct.

Q. And she never would get any relief from that unless she does take it all the rest of her life?

A. That is correct.

Q. You found something in her urine, didn't you, out of normal?

A. Yes, sir.

Q. Albumen?

A. Yes.

Q. Whenever a doctor, any experienced doctor like you are, first discovers albumen in the urine you immediately think of something the matter with the kidneys, don't you?

A. Yes, sir.

Q. And in fact that is a result of something being the matter with the kidneys, is it not?

A. Yes, sir.

Q. And you did find albumen in her urine?

A. Yes, sir. (R. 428).

Q. And there was something the matter with her kidneys?

A. Yes, sir, casts besides the albumen.

Q. But when you find albumen and casts both in the urine you know it is very serious, don't you?

A. Yes, I do.

Q. And as an experienced physician you knew that was a serious situation?

A. Yes, sir.

Q. Why was it that you refused to report these things to me?

A. I believe I had instructions not to.

Q. Had instructions from this attorney?

A. No, I believe it was Mr. Seaberry.

(R. 429).

RESPONDENT'S PLEADINGS WARRANTED CANCELLATION OF FRAUDLENT RELEASE

In his petition Respondent prayed that the release should be set aside because of the fraud practiced by Petitioner's Claim Agent, Frank Massey, and used in obtaining it, to wit:

> "That on the morning of Monday, January 9, 1939, an agent of the defendant named Massey went to the office of Dr. D. G. Curb, who had treated Azelene Buchanan on the previous Saturday night, and wrote out a typewritten statement misstating how the collision occurred and about her condition, which said agent got Dr. Curb to sign, and in which it was given as the doctor's opinion that
>
> " 'Outside of general soreness, there should be no disability as result of injuries. Complete recovery expected within two weeks following date of accident.'

"That said agent then went to the home of J. T. Brice on said morning of Monday, January 9, 1939, where said plaintiff Azelene Buchanan was sick and confined to her bed suffering great pain from said injuries she had received, and brought his typewriter with him, at a time when her husband was in Eastland County, and with the fraudulent intent to deceive and overreach the plaintiffs, and wrongfully to obtain a release from them, defendant's said agent Massey then and there told plaintiff Azelene Buchanan, in substance, that he was surprised to find her in bed as he had just had a talk with Dr. Curb, and that Dr. Curb had informed him that she was not seriously hurt, and that there was nothing serious the matter with her, and that she would be all right in a day or two, but said agent Massey concealed from her all knowledge about the statement he had written up on the typewriter and had Dr. Curb to sign, but he proceeded to ask her questions and to write on his typewriter, after which he handed to her a typewritten statement he had thus prepared and asked her to sign it, and having confidence in him, and believing the statement he had made to her that Dr. Curb had informed him that she was not seriously hurt, and that she would be all right in a few days, and being in great pain, and sick, and wanting to free herself from being further bothered by him, she glanced over the typewritten statement without reading it, and signed it without knowing what it contained, and said agent left no copy of it with her, and upon seeing a copy of it for the first time over a year after she had signed it, she ascertained that said agent had written several untrue statements in it that she had not made.

"That on the morning of Wednesday, January 11, 1939, defendant's said agent Massey came to the plaintiff A. L. Buchanan in the shop of J. T. Brice, and with fraudulent intent to deceive and overreach said plaintiff, told said plaintiff that said Massey had had a talk with Dr. Curb, and that Dr. Curb had told said Massey that his wife Azelene Buchanan was

not seriously hurt, and that there was nothing serious the matter with her, and that she would be all right in a few days, which in substance were the same representations said Massey had made to said Azelene Buchanan on January 9, 1939, *and said agent Massey assured said plaintiff that his wife was not seriously injured, and would be all right in a few days*, and said Massey proposed that the defendant would pay her doctor's bill, and requested that they sign a release. That plaintiffs were country people living on a farm, and had never had any experience with claims for damages, or with settlement of their legal rights with others, and were both wholly unfamiliar with their legal rights, and both were credible, and believed representations made to them, and they each believed the statements said Massey had made to them and relied upon such statements, and were induced thereby to believe, and did believe that defendant's said agent had told them the truth and that said Azelene Buchanan had not been seriously injured, and that she would be all right in a few days, and after said Massey had been with said A. L. Buchanan over an hour, said A. L. Buchanan told him that he thought he ought to have $50 to cover his loss of time in having to be away from his farm, livestock, milch cows, hogs and chickens, and for his expenses in driving to and from Albany, and said Massey proposed that the defendant would pay said $50 to cover said loss of time and expenses in coming to and from Albany, and it then being lunch time they agreed that they would meet back again after lunch. That when he went to the Brice home for lunch the plaintiffs discussed the proposal made by said Massey, *and they each believed and relied upon said statement made to them by said Massey* that Dr. Curb had told him that Azelene Buchanan was not seriously hurt, and that there was nothing serious the matter with her, and that she would be all right in a day or two, *and they each believed and relied upon the assurance given to them by said agent Massey that Azelene Buchanan was not seriously hurt but would be all right in a day or two,*

and they were induced thereby to accept the proposal of said Massey and agreed that they would sign the release, and upon his return to said Brice shop after lunch said Massey was advised of their decision, and said A. L. Buchanan went with said Massey to Massey's automobile parked in front of Dr. Curb's office, and in his automobile upon his typewriter he had there, said Massey filled in a printed form of release, and filled in a printed form of a check for $50, and the services of a Notary were procured for said Massey by Dr. Curb, and said Notary, Massey, and A. L. Buchanan went to the home of J. T. Brice, and it was necessary for A. L. Buchanan to assist his wife in getting from her bedroom into the sitting room, and there said Massey handed them the release he had prepared, and having had no experience with such matters, but believing and relying upon the statements and assurance said agent Massey had made to the plaintiffs that Azelene Buchanan was not seriously injured but would be all right in a few days, and having confidence in the opinion of said Dr. D. G. Curb, plaintiffs did not read said release, but merely glanced at it, and saw that it provided for the payment of $50, which they understood was to cover the loss of time of said A. L. Buchanan and his expenses in coming to and from Albany, so without knowing its contents, or having any knowledge of its printed provisions, plaintiffs signed said release and acknowledged it before said Notary who did not read it to either of them, and did not explain its contents to either of them, same being signed in duplicate, but said Massey did not give plaintiffs a copy of same, but kept both copies himself and then he handed A. L. Buchanan a check for $50 which he put in his pocket, and without ever reading it, he cashed at the bank on or about January 17, 1939, and his wife spent the money for farm and household necessities. That on March 30, 1940, plaintiffs learned for the first time that said Massey had written into said release false and fraudulent statements, embracing the words 'injuries developed or undeveloped,' and the words 'we

have represented that the injuries sustained are permanent and progressive and that recovery therefrom is uncertain and indefinite,' and

" 'in making this release and agreement, it is understood and agreed that I/we rely wholly upon my/our own judgment, belief and knowledge of the nature, extent and duration of said injuries and no representations or statements regarding said injuries or regarding any other matters made by the persons, firms or corporations who are hereby released or any person or persons representing him or them or by any physician or surgeon by him or them employed has influenced me/us to any extent whatever in making this release.'

"Plaintiffs allege that they had made none of said representations, and that at the time they signed said release, and accepted said $50 check, and cashed said check, neither of them knew that said release embraced said statements, and they did not know that said Massey had thus deceived and misled them, and that if either of them had known that the said release contained the above quoted statements they would not have signed the same, and they would not have accepted said check, and they would not have cashed said check, and plaintiffs further allege that if either of them had known that Azelene Buchanan was seriously injured, and that the statement of said agent Massey, that she was not seriously injured but would be all right in a day or so, was untrue, they would not have signed said release, and would not have accepted or cashed the said $50 check, but that plaintiffs were each misled, deceived and overreached by said agent Massey in his said statement, which they believed and relied upon, and were thereby induced to execute said release and to accept and cash the said check for $50, and that by reason of the allegations hereinabove set forth, the said release and check should be set aside, annulled and voided, and plaintiffs should not be bound thereby.

"In connection with the obtaining of said release

by defendant's said agent Massey, plaintiffs allege that after said Massey consulted with Dr. Curb on the morning of January 9, 1939, and had prepared the statement for Dr. Curb to sign, which said Massey had written on the professional stationery of Dr. Curb addressed to defendant at Fort Worth, and stating therein that the bill of Dr. Curb was $8 to date, the said agent Massey thereafter had knowledge of the fact that in the written statement he had later on that day prepared for and had plaintiff Azelene Buchanan to sign, the said Azelene Buchanan therein had described her injuries as follows:

" 'I got a cut on my forehead between my eyes, my neck sprained and down in between my shoulders, a bruise on my right elbow on the inside, my right upper leg and hip is blue and bruised, by left upper leg is sore, both my knees skinned, and my left shin is skinned, and my right ankle sprained, and my left big toe is sprained and swollen.'

"That said agent Massey did not inform Dr. Curb of the injuries said Azelene Buchanan claimed she was afflicted with, which were different from and additional to the ones Dr. Curb had mentioned in the said statement Massey had prepared and had him to sign, and he did not have Dr. Curb make any additional examination to determine the nature and extent of the said injuries Azelene Buchanan claimed she was then suffering from, but with the fraudulent intent of deceiving and overreaching the plaintiffs, he falsely stated to said Azelene Buchanan that she was not seriously injured, but would be all right in a day or two, and he thereafter falsely stated to said A. L. Buchanan that his wife was not seriously injured, but would be all right in a day or two, when he had reason to believe and did believe that she was seriously and permanently injured, and without their knowing its contents, he falsely and fraudulently had plaintiffs to sign and execute said release on January 11, 1939, which falsely stated that it settled 'injuries developed and undeveloped,' and it falsely stated that plaintiffs had "represented that the injuries sus-

tained are permanent and progressive and that recovery therefrom is uncertain and indefinite,' when plaintiffs had made no such representations, but defendant's said agent then knew that her injuries were 'permanent and progressive' and that her 'recovery therefrom was uncertain and indefinite,' and said agent Massey falsely and fraudulently wrote into said $50 check on January 11, 1939, that it was 'settlement in full of any and all claims against Southwestern Greyhound Lines, Inc., for personal injuries to Mrs. Azelene Buchanan by reason of the accident near Albany, Texas,' when he knew that she had made no claim against said defendant, and he knew that he had agreed with A. L. Buchanan that said $50 was to pay him for his loss of time and expense of coming to and from Albany, and that he had assured plaintiffs that she was not seriously injured but would be all right in a few days, and he knew that by such assurance he had induced plaintiffs to execute said release and to accept said check, and plaintiffs relied upon such assurances and did not examine or scrutinize the contents of said check, but assumed that it had been written in accord with said assurances and agreement, and plaintiffs show that because of said falsity and fraud the said agreement of settlement, and release, and check should be set aside, annulled and held for naught, and plaintiffs pray that the same be set aside, annulled and held for naught.

(R. 9-17).

"That on January 11, 1939, 4 days after the wreck, defendant's adjuster was skilled and experienced in obtaining releases, and then knew: that Mrs. Azelene Buchanan was sick in bed at her sister's home in Albany still suffering from injuries; that she had enumerated to him injuries not reported to him by the physician; that plaintiff was a slow-thinking farmer, inexperienced in business, then away from his home and farm duties and worried about his wife and the wreck; that no damages had been claimed for Mrs. Buchanan's injuries; and thus having a super-

ior advantage over plaintiff, the defendant's said adjuster overreached the plaintiff, and fraudulently wrote into said release provisions that were false and unusual and in themselves evidenced defendant's fraudulent intent, to-wit: that it covered Mrs. Azelene Buchanan's 'injuries developed or undeveloped,' and that the plaintiff and his wife 'have represented that the injuries sustained are permanent and progressive and that recovery therefrom is uncertain and indefinite,' and that the plaintiff 'relied wholly upon his own judgment, belief and knowledge, and not upon any representation of any physician or other person,' and plaintiff alleges that the $50 paid to him, and the $11 paid to Dr. D. G. Curb, embraces a consideration that is grossly inadequate and unconscionably disproportionate to the damages suffered by the plaintiff occasioned by the serious and permanent injuries plaintiff's wife sustained as a proximate result of defendant's negligence, and that the settlement and release should be set aside and annulled."

(R. 45).

IT WAS THE FALSE AND FRAUDULENT ASSURANCES MADE BY PETITIONER'S CLAIM AGENT THAT DECEIVED

Respondent's wife, MRS. AZELENE BUCHANAN, questioned by Petitioner, testified:

Q. If I may ask you to repeat again, what was it the adjuster said to you when he came into your room that morning?

A. He came up to my bed and told me that he was surprised to find me in bed as he had just had a talk with Dr. Curb, that I was all right and would be all right in a day or two, *and he assured me those things.*

(R. bottom 199).

CONCERNING THE RELEASE:

Q. You notice a part of the statement is in typewritten form?

A. I do now.

Q. At the time you signed this, what did Mr. Massey say to you?

A. Did not say anything to me, he did not explain anything to me.

Q. What did the notary public say to you?

A. He did not explain anything to me, he did not tell what it was or anything, just asked me if I acknowledged my signature there.

Q. Did anybody prevent you from reading the paper?

A. I was prevented from reading the paper because I was ill and was not able to be doing things like that.

(R. 204-205).

Q. The defendant requested permission for Dr. Curb to examine you?

A. Yes.

Q. And he did examine you?

A. Yes.

Q. And at the time you were examined, that was along in the early part of July?

A. Yes.

Q. Is it not true the reason you would not answer the Doctor's questions was because your counsel had advised you so to do?

A. That was because he had made some false statements, too.

(R. 208).

ON REDIRECT EXAMINATION BY MR. BLANTON:

Q. Tell the jury whether or not before you went to Dr. Curb that I, as your lawyer, told you to allow the doctor to examine you any way he wanted to, but not to make any statements to him, because afterwards, he being antagonistic, he might contend that you said one thing and you another?

A. Yes, that is it.

Q. Did you or not tell the doctor that he could examine you any way he wanted to?

A. Yes, sir.

Q. How long did he examine you there in his of-

fice?

A. He kept me about forty or forty-five minutes.

Q. And did you object to any of his examination?

A. I did not.

(R. 210-211).

Q. You have testified about a statement made by Mr. Frank Massey to you on Monday when he brought his typewriter up there, about representations Dr. Curb had made to him about you and your condition and about certain assurances that Frank Massey had made to you about your condition on that day, Monday; now tell the jury had it not been for those statements and representations and assurances that Mr. Massey made to you on Monday, and had it not been for the statement that your husband made to you at noon about Mr. Massey's conversation with him, had it not been for those things, would you have signed these papers?

A. No, sir.

(R. 215).

Q. Answer yes or no, whether or not you would have signed these papers if he had not made those statements and assurances?

A. I would not have.

Q. Mrs. Buchanan, state whether or not you believed those representations that Mr. Frank Massey made to you.

A. I believed everything he told me, because I did not have any reason not to believe those things; he assured me and told he that.

Q. Did you or not rely upon those statements?

A. I did.

Q. Were you or not induced by reason of those representations to sign these papers?

A. I was.

(R. 216-217).

Q. Mrs. Buchanan, at the time you signed this document, did you know that it represented that the $50.00 that was being paid your husband was to cover all injuries, to you, "developed or undeveloped," did you know that was in there?

A. No, sir.

Q. If you had known it, would you have signed it?

A. No.

Q. Did you know that this document, at the time you signed it and at the time that check was taken and cashed, did you know that it contained this language, that you and your husband had "represented that the injuries sustained are permanent and progressive, and that recovery therefrom is uncertain and indefinite," did you know that it contained that language?

A. No, I did not.

Q. Did you know that it contained any language about your injuries?

A. No, I did not.

Q. If you had known that it contained that language, would you or not have signed this document?

A. No.

Q. Or accepted the check?

A. No. (R. 220).

RESPONDENT A. L. BUCHANAN TESTIFIED:

That he returned to Albany Tuesday night and learned from his wife that an adjuster had been there and had made a statement to her; that the next morning, Wednesday, the adjuster Frank Massey was looking for him, and met him in Brice's auto shop, and talked to him for an hour or two before noon.

Q. Turn to the jury, Mr. Buchanan, and tell that jury exactly what he told you, if anything, about your wife?

A. Well, he told me that he had been to see Dr. Curb and that he said she would be all right in a few days and that he was sure she would.

Q. Whether or not he said anything to you at that time about what Dr. Curb had told him as to whether her injuries were serious or not.

A. He said they were not.

Q. That who had said so?

A. He did not say who said so, he said he was sure she would be all right in a few days.

Q. And he told you her injuries were not serious?

A. Yes.

Q. He told you that?

A. Yes. (R. 319-320).

Q. When this adjuster of the defendant told you he had been to see Dr. Curb, did he tell you anything Dr. Curb represented about your wife or not?

A. Yes, sir.

Q. Tell the jury exactly what he said Dr. Curb said about your wife?

A. He said that Dr. Curb told him that she would be all right in a very few days.

Q. He told you that?

A. Yes.

Q. And then you say he assured you she was not hurt seriously?

A. Yes, sir.

Q. After he told you what Dr. Curb had said, and after his assurance to you that she was not hurt seriously, did you believe it?

A. Yes.

Q. Did you rely on what he told you?

A. Yes.

Q. Did you have any reason not to believe what he told you wasn't true?

A. No, sir.

Q. Mr. Buchanan, up to that time, had you ever had or not any experience in settling any claims of any kind with anybody?

A. No, sir.

Q. Have you ever had any business dealings with anybody other than performing manual labor?

A. No.

Q. If there was a proposition made to you by that adjuster at that time, tell what first happened and what afterwards happened, go ahead and tell the jury.

A. He made a proposition to me that he would pay the doctor bill and settle up.

Q. What did you tell him, if anything?

A. I told him I thought I ought to have something for loss of time and trouble.

Q. Now, when you told him that, what did he say?

A. Well, he said he would pay the doctor bill and give me $25.00.

Q. For what, $25.00 for what?

A. Loss of time and trouble and expense in coming up there.

Q. Up to that time, Mr. Buchanan, had you ever made any claim against the bus company for your wife's injuries?

A. No, sir.

Q. Had you said anything about claiming anything for your wife's injuries?

A. No, sir.

Q. To anybody?

A. No, sir.

Q. What did you tell him when he offered you $25.00 for your time and expense?

A. I told him I would take $50.00.

Q. Then, what did he say?

A. Well, he talked around awhile and after a while he agreed to it.

Q. He agreed to what?

A. To pay me $50.00.

Q. For what?

A. Well, for loss of time and expenses. (R. 323-324).

Q. Answer whether or not you accepted or went somewhere first?

A. I went up to the house, J. T.'s house, where my wife was.

Q. What time of day was that?

A. About 12 o'clock.

Q. When you went up there to lunch at Mr. Brice's, did you or not tell your wife what this man had told you?

A. Yes, sir, I did.

Q. Mr. Buchanan, now when you went back after lunch, what occurred between you all, did you or not

tell him that you would accept his proposition to pay you $50.00 for your loss of time and expenses; tell the jury exactly what you told him when you went back there?

A. We talked around awhile and I told him that I would settle with him that way.

Q. If you had not believed him and relied upon his statement that your wife was not seriously injured and would be all right in a few days, would you have settled with him?

A. No, sir.

Q. Mr. Buchanan, after you told him what you did, where did you and Mr., the adjuster, Frank Massey, go, if anywhere?

A. We went to his car.

Q. His car was where?

A. It was in front of Dr. Curb's office, I believe.

Q. What did this man do when he went to his car in front of Dr. Curb's office?

A. I believe he went into Dr. Curb's office and told him to call a Notary.

Q. And did or did not the doctor respond to his request, and did he not call a notary?

A. Yes.

Q. What did he do, the adjuster, in his car?

A. He wrote out some stuff on his typewriter.

Q. Did he have a typewriter in his car there?

A. Yes, sir.

Q. And you say he wrote out some stuff?

A. Yes, sir.

Q. Then where did you all go, if anywhere?

A. We went up to J. T. Brice's house.

Q. And what did you do, if anything?

A. Well, after we got up to the house I went in where my wife was in the bedroom.

Q. Where was she when you got in her room?

A. In bed.

Q. What did you do, if anything?

A. I carried her in the room where they were.

Q. In the room where who was?

A. Mr. Massey and this Notary.

Q. You carried her in there, you say?

A. Yes.

Q. State whether or not at that time he read these papers, this release, over to you and your wife?

A. He did not.

Q. State whether or not at that time you or your wife either one read those papers before you signed them?

A. We did not. (R. 325-331).

Q. Mr. Buchanan, if you had known that these things that you now know were in these documents, would you have signed them?

A. No, sir.

Q. At the time you received— when you signed this release and at the time you received this check and later cashed it, did you or not at that time know that your wife's pelvis bone had been injured?

A. No, sir.

Q. Did you or not at that time know your wife's right pelvis bone had been broken?

A. No, sir.

Q. And fractured?

A. No, sir.

Q. Did you or not at that time know that there was a displaced uterus in your wife?

A. No, sir.

Q. Did you or not at that time know your wife's bronchial tubes had been affected?

A. No, sir.

Q. Until they would show infection 18 months afterwards?

A. No, sir.

Q. Did you at that time know that your wife's kidneys had been affected to such an extent that 18 months afterwards there would be pus cells in them?

A. No, sir.

Q. Did you or not at that time know that your wife's foot and instep had been injured so they would show it 18 months afterwards?

A. No, sir.

Q. Did you or not at that time know that your

wife's head had been bruised to such extent that it would cause headaches and sleepliness for 18 months afterwards and would require medicine for her to sleep?

A. No, sir.

Q. Did you at that time know that she had received such injuries from that wreck that she could not therafter for 18 months afterwards stand children around her?

A. No, sir.

Q. And that she was in such state of nervousness that she had to have them taken away from her?

A. No, sir.

Q. Did you or not know at that time that your wife had received such injuries that she for 18 months afterwards would not be able to go to dances or young people's entertainments?

A. No, sir.

Q. If you had known that those conditions existed and would eventuate in that kind of situation, would you or not have ever signed this release?

A. No, sir.

Q. Would you or not have ever accepted this check and cashed it?

A. No, sir. (R. 333-334-335).

Q. Up to January 11, 1939, tell the jury what has been the reasonable value of your loss of time being away from your farm and from your livestock and cattle and hogs and so forth, and also the expense of going to and from Albany from Rising Star, what was the reasonable value of that to you?

A. I figured it was about $50.00.

CROSS EXAMINED, RESPONDENT TESTIFIED:

Q. You and Mr. Massey talked for something like two hours that morning, didn't you?

A. Yes, sir.

Q. And he told you furthermore on that occasion that Dr. Curb had given him a written statement about the condition of your wife, didn't he?

A. No, he did not.

Q. I will ask you again if it is not true, Mr. Massey showed you that statement you now have in your hand, Exhibit No. 9, when you and he were sitting out there in the car, and you read it?

A. I say I do not think I have ever seen it before.

Q. Now, then, Mr. Buchanan, will you tell the Court again what Mr. Massey told you about the condition of your wife?

A. Yes, sir. He said that Dr. Curb had told him that she would be all right in a few days and he assured me that she would be all right.

Q. I want to know what he said, not assured, what did he say to you, his words?

A. He just said Dr. Curb told him she would be all right in a few days and he was sure she would himself.

(R. 350-351).

APOLOGY

We apologize for the length of this statement. We feel that nothing less would give the Court a fair picture of what is involved in this case. We believe that the evidence quoted from the Record amply supports the verdict of the jury, and the judgment of the trial Court.

ARGUMENT

In rendering the opinion for the Circuit Court of Appeals for the Fifth Circuit, Mr. Justice Foster appropriately said:

"The judge's charge correctly stated the law of Texas, which is in line with the general jurisprudence. 7 Tex. Jur. 906, Section 16; Smith vs. Atchison, T. & S. F. Ry., 232 S. W. 290; Cowan vs. El Paso Electric Ry. Co., 271 S. W. 79; Duncan vs. Texas Employers' Ins. Ass'n., 105 S. W. (2d) 403; International & G. N. R. Co. vs. Shuford 81 S. W. 1189.

"It is apparent the case was strictly one for the jury,

whose duty it was to pass upon the truthfulness of the witnesses and the weight to be given to their evidence. There is no doubt that if the jury believed the evidence for plaintiff there was sufficient to justify them in finding that the settlement was induced by fraud."

Texas Jurisprudence, Vol. 7, Sec. 16, page 906, correctly states the rule as follows:

> "Cancellation may be had on the ground that the execution of the instrument was induced by fraud, deceit, artifice *or* imposition."

Corpus Juris, Vol. 53, Sec. 34, page 1217, also clearly states the law as follows:

> "A release is invalid and not binding, and may be avoided and set aside, if procured by fraud or deceit."

It cites leading cases from numerous States in the United States, and in England and Canada.

Texas Jurisprudence, Vol. 7, Sec. 34, page 940, states:

> "A proper case for a decree of cancellation may be established, however, by proof of inadequacy of price accompanied by incidents showing bad faith,—such as concealments, misrepresentations, undue advantage, ignorance, weakness of mind, incapacity, pecuniary necessity, or an overreaching of the complainant."

CORPUS JURIS, Vol. 53, Sec. 33, page 1216, says:

> "It is generally held that an innocent misrepresentation by the releasee or his agent of a material fact intended to be acted upon by the releasor, and relied upon by him, is effective to avoid a release induced thereby"

citing U. S. The Henry S. Grove, 22 F. (2nd) 444, and a number of States cases.

CORPUS JURIS, Vol. 53, Sec. 38, page 1223, says:

> "It has been said that there may be a fraudulent and wrongful concealment of the fact involved in the

giving of a release as well as a misrepresentation, and that a false suggestion or suppression of truth affords a sufficient ground to set aside *any* release."

Also on said page 1223 CORPUS JURIS says:

"INADEQUACY OF CONSIDERATION may be so gross or shocking that it can be held to be in itself a badge of fraud."

And on the next page, 1224, CORPUS JURIS says:

"It has been held that a release may be avoided if procured under circumstances showing such superior advantage on the part of the releasee as taints the transaction with constructive fraud."

Also, it is there held:

"Suffering will be considered along with other circumstances, in determining whether the transaction is tainted with fraud."

On said page 1224 it is also held:

"THE PRESENCE OF UNUSUAL CLAUSES IN A RELEASE has a tendency to excite suspicion of fraud"

citing the case of Girard vs. St. Louis Car-Wheel Co., 46 Mo. A. 79, 84, where the release contained the clause:

"The releasor agrees to this deliberately, and of his own free will, and without any undue influence from anybody."

The release in this case before the Court contained the false recitals that Respondent and his wife "have represented that the injuries sustained are *permanent and progressive* and recovery therefrom is *uncertain and indefinite*,"

"and in making this release and agreement, it is understood and agreed that I/we rely wholly upon my/our own judgment, belief and knowledge of the nature, extent and duration of said injuries and that

no representations or statements regarding said injuries or regarding any other matters made by the persons, firms or corporations who are hereby released or any person or persons representing him or them employed *has influenced me/us to any extent whatever in making this release.*"

When Petitioner's agent and adjuster, Frank Massey, after several hours persistent insistence, induced Respondent to execute said release, he then knew that neither Respondent nor his wife had made any of such representations recited in said release, and he knew that such recitals were false, and he knew that neither had made any claim for injuries of Mrs. Buchanan, and he knew that when he took his typewriter to Dr. Curb's office on Monday morning after the wreck on Saturday night, he had never seen either Respondent or his wife, and Dr. Curb had seen Respondent's wife only two times, and he then employed Dr. Curb by agreeing to pay his bill and to pay Dr. Curb for making the statement, and he wrote in the statement he prepared for and had Dr. Curb then to sign several false assertions of fact of which he knew Dr. Curb had no knowledge, and he procured this statement specially prepared by himself, for which Petitioner paid money, with the intent and express purpose of using it to fraudulently obtain a release; that he put in the statement he wrote for Dr. Curb to sign only things such as his company was interested in and wanted for such purpose, and then within 40 hours after the wreck, when Respondent was in another county, he thrust himself into the bedroom of Respondent's wife, where and when she was sick and suffering from her injuries, and under the influence of opiates, and insisted on writing out a statement for her

to sign, into which he put many false assertions, and he then learned from her that she was seriously injured in many ways and particulars which he did not incorporate in the statement he had had Dr. Curb to sign, yet he assured her that she was not seriously injured and would be all right in a few days, and on Wednesday, without having again consulted with Dr. Curb, and without informing Dr. Curb of the injuries he had learned of from Mrs. Buchanan, and without having Dr. Curb examine her again, Massey represented to Respondent as a fact that Mrs. Buchanan was not seriously injured and that she would be all right in a few days, and *he assured Respondent of those facts*, and after several hours of insistence by offering Respondent, a slow-thinking farmer who had never had any experience with such matters, to pay him $50 to cover his expenses and loss of time in going to and fro from his farm to look after his injured wife, he by false representations induced Respondent to execute said release.

In the case of Wells et al vs. Houston, 69 S. W. 183, the Court in its opinion by Mr. Justice Neill, said:

> "Since Jacob took advantage of his brother's helpless, starving condition to obtain his birthright for a mess of pottage, estates in expectancy have been among men the subjects of contract; and in making them, too often has it been the voice of a Jacob, and the hand the hand of Esau. * * * Whenever the contract is obtained by fraud and inadequacy of consideration, equity will not withhold its relief from the party defrauded. * * * *It strikes down fraud when and wherever found*, and wrests its fruits from the fraudulent hand and restores it to whom it belongs."

In the case of Texas & N. O. Ry. vs. Thompson, 12 S. W.

(2nd) 963, the Commission of Appeals of Texas, in its opinion by Mr. Justice Critz (now on the Supreme Court of Texas) held:

> "Even though the plaintiff may have read over the release, and may have known its contents at the time he signed and delivered same to the claim agent of the defendant companies, such fact could not, in law, constitute such release a contract, binding on the plaintiff *if it was procured by fraud.*"

In the case of Duncan vs. Texas Emp. Ins. Asso., 105 S. W. (2nd) 403, cited by Mr. Justice Foster, in its opinion by Mr. Chief Justice Smith, held:

> "Defendant's claim agent, D. E. Newton, stated to plaintiff that she would be entirely well and on her feet by April 16, 1935, and defendant's physician stated to plaintiff that she would be well within 60 days from the date of the injury (which would be April 16, as stated to her by the agent). * * *
>
> "The question of *the good faith* of the physician and agent in making the statements to plaintiff that she would be well and able to return to her job by April 16, *is not material* to the case. Since the jury found that those statements were *untrue*, it does not matter whether the persons making them knew them to be untrue at the time made, for the fact that the statements were not intentionally false would not affect the right of the plaintiff to have the release set aside, if she were in fact misled by the statements." (Authorities cited).
>
> "If the releasor is under a present disability, physical or mental, from any cause; if he is subjected to high pressure from the agents of the releasee, or is subdued by statements, whether of positive past or present facts, or in the form of opinions which, by the manner in which they are pressed upon the releasor, may amount to statements of fact, the releasor may rely upon them without independent investigation, and without, in an action like this, consulting physicians of his own selection." (Authorities cited).

"We conclude, in accordance with the substantial weight of authority, that the facts stated, which are encompassed, expressly, or by necessary implication, in the jury finding, entitled plaintiff to judgment setting aside the release in question." (Numerous authorities cited.)

In the case of Smith vs. Atchison T. & S. F. Ry., 232 S. W. 200, cited by Mr. Justice Foster, the Commission of Appeals of Texas in its opinion, upheld by the Supreme Court of Texas, held:

"Dunaway alleged that he had used the money received from the railway company in consideration of the execution of the release of his claim for damages, and that he had no money with which to make a tender, but asked to have the amount so received credited upon any judgment he might recover.

"It was not necessary to Dunaway's suit for recission of the settlement that he tender the amount paid him in the settlement. Northwestern Life Ass'n. vs. Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189; Railway vs Cade, 93 S. W. 124; Railway vs. Jowers, 110 S. W. 946; North American Accident Ins. Co. vs. Miller, 193, S. W. 750. The fact that he had invested a part of the money received in a farm, which he owned at the time of the trial subject to an incumbrance, affords no basis for creating an exception to the rule.

"The position of the railway company was that the settlement was valid and conclusive. Under this condition it is patent that any offer by Dunaway to return the amount paid him would have been refused by the railway company. No preliminary tender can be insisted upon as a bar to legal action where the facts show the tender would have been rejected.

"Furthermore, one is never obliged, in an action for recission, to restore that which in any event he is entitled to retain either by virtue of the contract sought to be set aside, or of the original liability. The restoration of the amount, or an offer to restore it,

was therefore unnecessary as a condition to Dunaway's right to maintain the suit. The amount paid Dunaway in the settlement was properly credited on the judgment, thus affording to the railway company the full protection to which it was entitled."

In the case of Casualty Reciprocal Exchange vs. Bryan 101 S. W. (2d), 895, in an opinion by Mr. Chief Justice Leslie, the Court held:

"An innocent misrepresentation of a material fact, made by the releasee or his agent for the purpose of inducing a settlement, will justify the avoidance of a release induced thereby. The fact that the statement made was not intentionally false does not affect the right of the releasor to have the contract set aside if he was misled by the statement. 'In such a case, innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false'.

"In fact that such a representation was made in good faith, or that the claim agent, who knew of the misrepresentation, acted in good faith, is immaterial in so far as the right of the releasor to avoid the settlement is concerned."

"See Cowan vs. El Paso Elec. Ry. Co., (Tex. Com. App.) 271 S. W. 79, and numerous authorities cited by the text."

In the case of International & G. N. Ry. Co. vs. Shuford, 81 S. W. 1189, cited by Mr. Justice Foster, in its opinion by Mr. Chief Justice Fisher, the Court held:

"When the claim agent, accompanied by said doctor, came to see her about a settlement she suggested $500, and the claim agent offered $250, which because of her poverty and prostrated condition she accepted, and she executed a full release which she did not read.

"The $250 paid by the company for said release was deducted from the damages awarded her by the

verdict of the jury.

"The release purports to be a full settlement and compromise of all claims for damages, present and prospective, sustained by the appellee by reason of the collision.

"Of course, it is conceded that a mere erroneous expression of opinion affords no ground of relief, but when the expression takes the form of a statement of fact, and is so intended, or when it is expressed by one familiar with the facts, and comes from a source in which the plaintiff reposes confidence, and the expression is of a nature calculated to induce the belief that it is more than a mere opinion, and is of a nature that can be construed as a statement of fact, and is so considered, and is acted upon as such, its falsity, if concerning a matter material to the inducement to the execution of the contract, furnishes ground for relief. Newton vs. Ganns, 7 Tex. Civ. App. 90, 26 S. W.; Cole v. Carter, 22 Tex. Civ. App. 459, 54 S. W. 94; 14 Am. & Eng. Ency. Law (2d Ed.) 35 to 39; 2 Pomeroy, Eq. par. 878. This eminent author, in the section mentioned, states the rule as follows: 'Whenever the statement, although relating to a matter of opinion, is the affirmative of a fact, it may be a fraudulent representation. Such an affirmation might be made in several forms. The very fact concerning which the statement is made may be existence of an opinion. The existence of an opinion may be a fact material to the proposed transaction, and the statement that such an opinion exists becomes an affirmation of a material fact, and, if untrue, it is a misrepresentation. The opinion might either be represented as held by a third person, or as held by the very party making the statement. As a single illustration, either the third person or the party himself might be an expert, and their opinion might be material, so that the representation that the opinion was held might be the affirmation of a most material fact. There is still another and perhaps more common form of such misrepresentations. Whenever a party states a matter which might otherwise be only an opinion,

and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact, within the meaning of the general rule, and may be a fraudulent misrepresentation.' If we consider the statement of the physician as to the extent of her injuries as false, and that she relied upon the truth of such representations, and reposed confidence in him as a friend and a physician, which the verdict of the jury has determined to be the case, coupled with the fact that there is evidence tending to show that the agents of appellant took advantage of her necessities, and of her physical and mental weakened and prostrated condition, to induce her to execute the release, then the case of fraud is clear, and the contract of release was properly canceled.

" 'When the party is misled by the fraudulent representations of the other party, and caused by confidence in such person and his representations, to sign the instrument without reading it, this does not constitute such negligence as will deprive the maker of the instrument of equitable relief from the consequences of the fraudulent representations.'

"If we concede that she did voluntarily sign it, and that at the time she did not read it, but fully understood its nature and legal effect, and that it is ever so binding and conclusive in its terms against her, still, if its execution was procured by reason of false and fraudulent representations of a material nature that induced her to execute it, she at the time believing in the truth of such statements, and, acting upon such belief, signed the release, equity would cancel it."

In the case of Cowan vs. El Paso Elec. Ry. Co., 271 S. W. 79, cited by Mr. Justice Foster, the Commission of Appeals of Texas, in its opinion by Mr. Justice Chapman, held that even though the jury found that the claim agent

at the time he secured the release believed and relied on the statement made by the physician, Cowan would not be bound by the release.

In the case of Texas Central Ry. Co. vs. Neill, 159 S. W. 1180, it was held:

> "The point is raised in several ways that the settlement and release for $1,500 was binding upon appellees, in the absence of fraud or bad faith on the part of appellant's agents, whose representations induced the settlement. It can make no difference that appellant's agents believed the representations to be true which they made to induce deceased to execute the release. If the same were in fact false, appellees were entitled to relief against them. M., K. & T. Ry. Co. v. Reno, 146 S. W. 207; G., C. & S. F. Ry. v. Ruyett, 49 Tex. Civ. App. 395, 108 S. W. 502."

In the case of M., K. & T. Ry. Co. vs. Reno, 146 S. W. 207, it was held:

> "Notwithstanding appellant's agent may have believed the representations to be true which he made to plaintiff to induce him to execute the release, yet, if the same were false, plaintiff was entitled to relief against them, notwithstanding the fact that defendant's agent may have innocently made the statements. It is immaterial that the agent may have made the statements under the honest belief that they were true; whereas, in fact, they were not. See H. & T. C. Ry. Co. v. Brown, 69 S. W. 651, and authorities there cited; Pendarvis v. Gray, 41 Tex. 326; Carter v. Cole, 42 S. W. 369, and authorities there cited; Cabaness v. Holland, 19 Tex. Civ. App. 391, 47 S. W. 379; Bigelow on Frauds, 411-414."

It was undisputed in evidence, and therefore the Court did not submit the matter to the jury as an issue, that the consideration paid for the release was grossly inadequate and unconscionably disproportionate to the damages suf-

fered by the plaintiff occasioned by the serious and permanent injuries his wife sustained, and this coupled with the fraud practiced upon Respondent by Petitioner's adjuster, Massey, in procuring the release, warrants the setting aside of said release. Corpus Juris, Vol. 53, Sec. 39, page 1223, and numerous authorities cited thereunder in footnotes 40, 41 and 42.

In the case of Williams vs. Smith 7 L. J. C. H. O. S. 129, it was held:

> "Whereas, because of the combination of the ignorance and unprotected state of the releasors, their pecuniary distress, and their total want of all knowledge of information as to the methods or habits of business, with the great inadequacy of price, a court of equity will set aside the release."

DAMAGES AWARDED NOT EXCESSIVE

In *Southern Fruit Distributors vs. Fulner*, 107 F. (2) 456, it was held:

> "Whether damages awarded are excessive is a matter addressed to the sole discretion of the trial court, whose ruling will not be reviewed by the appellate court in absence of abuse."

In *Stenton Electric Mfg. Co. vs. Kloxon*, 30 F. Supp. 425, it was held:

> "Where matter of assessing damages is in province of the jury, the court should not interfere with the verdict unless the amount is so excessive as to indicate passion and prejudice and cannot be accounted for in any other way."

In *Ells vs. Scondrett*, 28 F. Suppl. 16; appeal dismissed 106 F. (2) 1016, it was held that $40,000 was not excessive where a boy lost his right arm and three fingers on his left hand.

In *Dr. Pepper Btl. Co. vs. Rainboldt*, 66 S. W. (2nd) 496, it was held that $40,000 was not excessive where a girl's bladder was injured so that she would not be able to bear children.

In the case of *San Antonio U. & G. Ry. Co. vs. Dawson*, 201 S. W. 247, it was held that $30,000 was not excessive where a man 45 years of age had one leg severed and was permanently injured.

In the case of *T. & N. O. Ry. Co. vs. Rittmann*, 87 S. W. (2d) 745, it was held that $20,000 was not excessive where a man was permanently disabled and was extremely nervous and restless.

In the case of *Benson vs. Chicago R. I. & P. R. Co.*, 352 Il. 195, 290 U. S. 635, it was held that $32,500 was not excessive where a railroad switchman had a severe injury to his back which still required medical attention.

In the case of *Rey Famous Players vs. Lasky Corp.* 30 Fed. 2nd 402, it was held that $28,541 was not excessive where a man 28 years old was permanently injured.

In the case of *Kepner vs. Cleveland C. C. & St. L. R. Co.*, 15 S. W. (2d) 825; 280 U. S. 564, it was held that $25,000 was not excessive where a railroad employee 39 years old was permanently injured, and for the past year had been unable to earn anything.

In the case of *International-Great Northern R. Co. vs. Hailey*, 9 S. W. (2d) 182; 280 U. S. 558, it was held that $17,500 was not excessive where a brakeman 43 years old was permanently injured in the sacral regions.

In the case of *Lincoln vs. Stone*, 42 S. W. (2d) 128 reversed on other grounds in 59 S. W. (2d) 100, it was held that $20,000 was not excessive where a trained nurse was permanently injured and her face was disfigured, affecting her physical appearance.

In the case of *Brown vs. Evans*, 17 F. 912, judgment affirmed by U. S. Supreme Court, 109 U. S. 180, the Court held:

> "A new trial will not be granted on the ground of excessive damage, in an action for tort, unless it appears that the jury were influenced by passion, prejudice, corruption, or wilful disregard of the law in assessing such damages."

In the case of *Rickle vs. American Car & Foundry Co.*, 194 F. 459, affirmed, 200 F. 27, the Court held:

> "The deliberations of jurors is conclusively merged in their verdict, so far as they are concerned, unless misconduct in reaching it is shown from other sources than from jurors themselves."

In *Mississippi Ry. Co. v. Lott*, 80 So. 277, it was held that $20,000 was not excessive where a laborer suffered injury to lungs.

SIMILAR INJURIES

In the case of *Terry Shipbuilding Co. vs. Odell*, 105 S. E. 864, it was held that $25,410 was not excessive where the sacroiliac was affected, and there was loss of sexual power.

In the case of *Dahlstrom vs. Northern Pac. Ry.* 98 Wash., 390, it was held that $16,000 was not excessive where a young married woman was afflicted with nervousness and loss of sexual power.

CASES CITED BY PETITIONER NOT CONFLICTING

When there are eleven different Courts of Civil Appeals, and two Commissions of Appeal, Sections A and B, in Texas inferior to the Supreme Court of Texas, all grinding out conflicting decisions each week and none becoming the law until approved by the Supreme Court, it is surprising that Petitioner was not able to find at least one opinion that conflicts with the opinion of the Honorable United States Circuit Court of Appeals for the Fifth Circuit in this case.

The first case cited by Petitioner, upon which it most relies, is that of LIPSCOMB VS. HOUSTON ELECTRIC CO. 149 S. W. (2nd) 1042, which is not conflicting, the Dallas Court of Civil Appeals therein holding that *the plaintiff had wholly failed to prove any negligence*, and that the evidence showed that Dr. Collette, upon whose statements to her she relied, was not employed in any way by the defendant, the opinion stating:

> "The above facts go no further than to show an unexplained accident in which Mrs. Lipscomb sustained an injury. Since the existence of facts which would show actionable negligence on the part of appellee cannot be presumed, the action of the trial court in discharging the jury and rendering judgment in favor of appellee must be sustained."
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> * * * *
>
> "No sufficient authority authorizing Dr. Collette to bind appellee by the statements he is alleged to have made to appellants is shown in the record."
>
> * * * *
>
> "To set aside a release * * * it must appear that the physician's representations *'were fraudulently used by the releasee* or his agent taking advantage of the claimant's confidence in the physician's judgment to effect a settlement disadvantageous to the injured

person.' Cowan vs. El Paso Elec. R. Co., Tex. Com. App., 271 S. W. 79; Gulf C. & S. F. Ry. Co. vs. Huyett, 49 Tex. Civ. App. 395, 108 S. W. 502, error refused; Great American Indemnity Co. vs. Blakely, Tex. Civ. App. 107 S. W. (2d) 1002."

In the other case of SITCHON VS. AMERICAN EXPORT LINES, 113 FED. (2nd) 830, cited by Petitioner as being in conflict (Pet. for Cer. 12), there is no conflict whatever, as fraud was neither alleged nor proven, and the releasor was represented by his employed attorney, who presented his claim, and negotiated the settlement, and the plaintiff testified that both his attorney and the Company's attorneys "believed that $180. was a fair, just and reasonable settlement under all of the circumstances," and the Court held:

> "There was no attempt of overreaching or unfairness on the part of anyone concerned. There was a mutual mistake as to the nature and extent of the injuries. The settlement does not bear the slightest taint of fraud."

In the case of T. & N. O. RY. CO. VS. HAWKINS, 112 S. W. (2nd) 1107, cited by Petitioner, there is no conflict whatever, the San Antonio Court of Civil Appeals based its decision on the fact that the settlement was negotiated by and agreed upon by the plaintiff's attorney, and held:

> "The evidence also showed, conclusively, that appellee had an attorney of his own selection, one Sasse, throughout the negotiations for and conclusion of the settlement, upon whose consultation with appellee's physician, the claim was compromised and settled.
>
> "He also repeatedly testified, particularly upon the former trial, that he was led to settle by the expectation of getting more money later than that obtained by the settlement; that he understood, when the claim agent offered $250, that he would be paid more later;

that he was assured by his attorney, Sasse, that if he would settle now for $325 he (Sasse) 'would hold them up for $12,000' more. Aside from the conclusive and undisputed evidence that appellee was induced to make the settlement, and execute the release for $325, upon the advice of his attorney, his son, and his physician."

In the case of PANHANDLE & SANTA FE RAILWAY COMPANY VS. O'NEAL, 119 S. W. (2nd) 1077, cited by Petitioner, there is no conflict whatever, as the Eastland Court of Civil Appeals held *"that the doctor's statement was not assailed as being other than an expression of opinion and the plaintiff did not show that it was made in contemplation of a settlement,"* and further held:

"The authorities announce the general rule that to constitute actionable fraud it must appear: (1) That a material representation was made; (2) that it was false; (3) that, when the speaker made it, he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that he thereby suffered injury."

In the case of H. & T. C. RY. CO. VS. McCARTY, 60 S. W. 429, cited by Petitioner, there is no conflict whatever, and the facts thereof in no way apply, as there was no fraud either alleged or proven, and the Court held: *"There is no fraud, misrepresentations, concealment, or other misleading incidents."*

WILLISTON'S LAW OF CONTRACTS, Volume 3, Section 1487, cited by Petitioner, also says:

"It is undoubtedly true that wherever the circumstances are such as to warrant an action of deceit for

inducing a person to enter a contract, that will certainly warrant avoidance or recision of the contract."

Its Section 1491 following the above, says:

"Recision is allowable for honest misrepresentations. It is not necessary in order that a contract may be rescinded for fraud or misrepresentations that the party making the misrepresentations should have known that it was false. Innocent representation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false misrepresentations even innocently, to retain the fruits of the bargain induced by such representation."

"In a doubtful case *the determination of it is one of fact for the jury.*" * * * "A false statement 'that the mill is doing well,' when the mill was hopelessly insolvent, was rightly held an actionable fraud."

TEXAS JURISPRUDENCE, Volume 20, Section 8, pages 17-19, cited by Petitioner, does not support its contention, but on the contrary in every way supports the judgment of the trial Court, and the opinion of the Circuit Court, and the position taken by Respondent, and shows no conflict whatever, holding:

"In a suit based upon an alleged false representation the plaintiff, in order to prevail, must ordinarily show that defendant was connected with the making of the representation; that the representation was as to a material fact; that the representation was false at the time it was made; that the representation was made with intent and design to induce the plaintiff to do some act; that the representation was relied on by the plaintiff; that the plaintiff was induced thereby to act, and that the plaintiff thereby suffered damage or injury. It further holds that in Texas the intent to deceive is immaterial, also 'that actionable fraud exists when one makes a false representation of a material fact with the intent of inducing another

to rely upon it to his pecuniary injury, and that when there is an intent to deceive, the case is one of manifest fraud'."

In the case of FARRAR, WALTON, ADMINISTRATOR, ET AL. VS. JOHN CHURCHILL, TRUSTEE, ET AL. 135 U. S. 609, cited by Petitioner, there was no fraud or concealment, and the Court held:

> "As a purchaser of Real Estate, to whom representations of the character and value of the property are made by the vendor, visits the property itself prior to the sale, and makes a personal examination of it testing its representations, he will be presumed to rely on his own examination in making the purchase, and not upon the representations of the vendor, and *in the absence of fraud or concealment* cannot have the sales set aside."

Petitioner's quotation from 3 CORPUS JURIS SECUNDUM 192 (page 19 of its Brief) is wholly inapplicable to the facts of this case, but just above its quotation, the following was said:

> "Where the principal has ratified the Agent's fraud by seeking to take advantage of the situation it brought about, he can not avoid responsibility for the Agent's actions by maintaining that the agent in so doing was acting outside his authority, or was purporting to be acting for both parties."

In the case of DOUDA VS. CHICAGO R. I. & P. RY. CO., 119 N. W. 272, cited by Petitioner, the Court held that it was not shown that the statement of the Claim Agent was fraudulently made, *and it does not appear that plaintiff relied on the Claim Agent's statement*, and the Court said:

> "It was competent to show that plaintiff did not in fact know the contents of the instrument which he

signed, and that such contents were misrepresented to him by defendant's agent."

Petitioner's quotation from R. C. L., VOLUME 23, 393, is not applicable to the facts of this case, but it did there say, which is applicable, that:

> "It is also generally held that the fact that the statements made by releasee's physician as to the character of releasor's injuries at the time of diagnosis are not intentionally false, does not affect the right of the latter to avoid the release."

(Citing Haigh vs. Whiteway Laundry Company, 164 Iowa 143 in 145 N. W.; also Jacobson vs. Chicago Ry. Co. 132 Minn. 181 in 156 N. W. 251).

On the preceding page, 392, of said Volume 23, of R. L. C., it said:

> "Where, however, for the purpose of inducing a settlement the releasee's physician after gaining the confidence of the releasor, makes to him statements and assurances respecting the likelihood of recovery and probable duration of the injury which are reckless and proven untrue, and in this manner induces the patient to sign a release, it has been held that the release may be avoided on the ground that the physician violated the duties and obligations incident to the relation of physician and patient."

(Citing Viallel vs. Consolidated Ry. Co. 30 Utah, 260 in 84 Pacific 496).

As a basis for the quotation Petitioner cites from A. L. R., VOL. 48, PAGE 1508, which is inapplicable to this case, A. L. R. there cites only one case, that of COLORADO SPRINGS & INTERURBAN RY. CO. VS. HUNTLING, 181 PAC. 129, and A. L. R. there goes on to say:

> "But even though the releasor has his own physician, if he relies upon the representations of the re-

leasees' physician that his injuries are slight, it has been held that the releasee cannot sustain the release on the theory that the injured person should and must have known something of his condition outside of any representation made by the physician of the releasee, and therefore could not have been misleading; in other words, it does not lie in the mouth of the releasee to say that the injured person cannot safely rely upon statements of its chief physician or surgeon. (Citing St. Louis I. M. & S. Ry. Co. vs. Hambright 87, Ark. 614, in 113 S. W. 803.

"And the releasor may not be bound necessarily to rely on the opinion of his own physician." (Citing Pierce vs. Seattle Electric Company 83, Washington, 141 in 145 Pacific, 228)."

In the HUNTLING case above referred to, the plaintiff employed Dr. Allen upon the advice of her attorney, Judge Orr, and through Dr. Allen she employed Dr. McKinney, and she cashed the check given to her in settlement four months after she learned of her serious injuries, and she continued to use the money from such settlement two years before she questioned the release, and the Court held:

"There is absolutely nothing in this record to impeach their good faith or their loyalty to her interest."

And the Court further held:

"The trial Court very properly instructed the jury that the orderly method of procedure for it to pursue in arriving at its verdict, would be to determine first the validity of the release."

No fraud, or undue influence, or overreaching, was in the case of QUEBE VS. GULF C. & S. F. R. CO. 81 S. W. 20, cited by Petitioner, the Court holding:

"We repeat that what we have thus far considered is the application of the rule of construction by which

the legal meaning of the release is to be ascertained, and not the principles governing in cases where such instruments are sought to be set aside or restricted in their operation on grounds of fraud or mistake."

"No fraud appears in the case."

"No circumstance of undue influence or overreaching is shown."

In the case of GULF C. & S. F. R. CO. VS. HUYETT, 92, S. W. 454, cited by Petitioner, the facts are wholly inapplicable to this case, as the physician was wholly disconnected with the settlement, and had nothing to do with the settlement, the Court holding:

"There is no evidence that the doctor knew of the interviews between plaintiff and the claim agent, or that a settlement was then being discussed between them, nor is there any evidence that the claim agent knew of the statement made by the doctor to the plaintiff, or that the doctor in any way acted with him in procuring or for the purpose of procuring a settlement.

"The representation relied on to avoid the release, therefore, does not appear to have been made in the transaction in which the contract of settlement was made, nor by the agent authorized to represent the defendant therein; but, so far as the evidence indicates, it was disconnected from that contract and made by an agent whose duties, as agent, had no relation to such matters."

In the case of TEXAS MIDLAND R. CO. VS. WILSON, 263 S. W. 1109, cited by the Petitioner, the facts do not apply to this case, the Court holding that the statement made by Dr. Monday

"was made about three months before appellee executed the release, and, reasonably, could not have induced him to execute it."

In the case of ALENKOWSKY VS. TEXAS & N. O. CO., 188 S. W. 956, cited by Petitioner, the facts therein in no way support the contention of Petitioner. The Court held:

> "An issue having been raised respecting the validity of the release, it was error to refuse to submit the same to the jury." Hence, it showed no conflict, as the Court in this case, did submit such issue to the jury.

The Court further held that the doctor's statement

> "was the positive statement of an existing fact," and
> "was not a mere statement of opinion";

and as a basis for its holding, the Court cited the following cases, which hold against Petitioner's contention, to-wit:

> "Houston & T. C. R. Co. vs. Brown, 69 S. W., 651, wherein Mr. Chief Justice Fisher held that a statement made by a physician is a statement of fact, and if false the release should be set aside even though the representations were innocent and were not intentionally false. Citing Pendarvis vs. Gray, 41 Tex. 329, Culberson vs. Blanchard 79, Tex. 492, 15 S. W. 700, Cabaness vs. Holland 47, S. W. 379.
>
> "In Houston T. C. R. Co. vs. Bright, 156 S. W. 305, the Court held when the Claim Agent used Dr. Red's statement as a means of deception to procure by the release an advantageous settlement in favor of the defendant, he practised a fraud upon the plaintiff which tainted the transaction and rendered the contract of settlement void.
>
> "Missouri K. & T. Ry. Co. of Texas, vs. Reno, 146, S. W. 207 held:
>
> " 'Notwithstanding appellant's agent may have believed the representations to be true which he made to plaintiff to induce him to execute the release, yet, if the same were false, plaintiff was entitled to relief against them, notwithstanding the fact that defend-

ant's agent may have innocently made the statements. It is immaterial that the agent may have made the statements under the honest belief that they were true; whereas, in fact, they were not. See H. & T. C. Ry. Co. v. Brown, 69 S. W. 651 and authorities there cited; Pendarvis v. Gray, 41 Tex. 326; Carter v. Cole, 42 S. W. 369, and authorities there cited; Cabaness v. Holland, 19 Tex. Civ. App. 391, 47 S. W. 379; Bigelow on Frauds, 411-414'."

The Judge of the State Court at Albany was temporarily misled by having cited to him said Lipscomb, Hawkins, O'Neal, McCarty and Alenkowsy cases, supra, Petitioner then making the same contentions before him, which caused him to give a peremptory instruction to and take the case away from the jury, but when he examined said cases, he promptly acknowledged his error, and unhesitatingly granted a new trial (R. 33), whereupon Respondent took a non-suit *without prejudice* (R. 34) and refiled the case in the Federal Court at Abilene, and Mr. Justice Foster, in rendering the opinion of the Circuit Court of Appeals for the Fifth Circuit, held: "The plea of former adjudication was entirely without merit (R. bottom 701), hence the only time the facts were ever passed upon by a jury, was in this case when the jury determined that the release was obtained through the fraudulent representations made by Petitioner's Claim Agent, Frank Massey, who deceived and overreached Respondent. (R. 669).

In the case of M. K. & T. R. Co. VS. HAVEN, 200 S. W. 1152, cited by Petitioner, there is no conflict, the Court holding:

"But the rule seems to be that if the statement were false, and were made to appellee to induce him

to settle his claim, the fact that they were innocently made by the surgeons would not deprive appellee of a right to have the release set aside. Railway Co. v. Neill, 159, S. W. 1180; Railway Co. v. Reno, 146 S. W. 207; Railway Co. v. Maples, 162 S. W. 426."

In the case of ST. LOUIS S. W. R. CO. VS. THOMAS, 244 S. W. 839, cited by Petitioner, there is no conflict, the Court holding:

"Haley and Graves knew at the time they negotiated the settlement that Dr. Daniels had made the statement; they assured appellee that the statement was a true one; they knew appellee believed it to be true; and they knew that such belief was the inducement to him to agree to the settlement. Ry. Co. v. Huyett, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669; Id., 49 Tex. Civ. App. 395, 108 S. W. 502; Alenkowsky v. R. Co. (Tex. Civ. App.) 188 S. W. 956; Boles v. Aldridge, 107 Tex. 209, 175 S. W. 1025. We think the jury had a right to conclude from those facts, as they did, that Haley and Graves took advantage of Dr. Daniels' statement and of appellee's reliance on same and settled with appeliee 'for a sum less than fair compensation for his injury'."

The case of EL PASO ELECTRIC CO. VS COWAN, 248 S. W. 442, cited by Petitioner, was the first of two appeals of said case, the El Paso Court of Civil Appeals reversing a judgment for Cowan on the sole ground *that improper leading questions were asked*, but in such opinion holding:

"That the representations were made in good faith, or whether the claim agent acted in good faith at the time he paid the compromise sum and took the release of future claims, is immaterial. Houston & T. C. R. Co. v. Brown (Tex. Civ. App.) 69 S. W. 651; Alenkowsky v. Texas & N. O. R. Co. (Tex. Civ. App.) 188 S. W. 956. Innocent misrepresentations of an existing fact which induce a party to act to his disadvantage

are the basis of relief as well as if they had been intentionally made. Pendarvis v. Gray, 41 Tex. 329. So it was not error to refuse special charge requested by appellant to that effect.

"True, the physician was not present at the time, but it would seem that these findings as a whole required the cancellation of the release. M., K. & T. Ry. Co. v. Ellison (Tex. Civ. App.) 165 S. W. 1020."

The above Cowan case was retried in the lower Court, and Cowan recovered a judgment for $9,384.00 damages, but was required to file a remittitur of $3,000, and the case for the second time went to said Court of Civil Appeals, EL PASO ELECTRIC RY. CO. VS. COWAN, 257 S. W. 941, it reversing and rendering the judgment, because it was not shown that the Claim Agent knew that the representations inducing the release was false. BUT SUCH JUDGMENT WAS CARRIED TO THE COMMISSION OF APPEALS OF TEXAS, SECTION A, and in its opinion rendered by a most distinguished jurist, Judge Chapman, adopted and approved by the SUPREME COURT OF TEXAS, through Chief Justice Cureton, in COWAN VS. EL PASO ELECTRIC RY. CO. 271 S. W. 79, it reversed the said judgment of the Court of Civil Appeals, and affirmed the judgment of the trial Court awarding $6,384.00 damages, holding:

"The law seems to be reasonably well settled that under the facts in the instant case Cowan would not be bound by the release. Houston & T. C. Ry. Co. v. Brown (Tex. Civ. App.) 69 S. W. 651 (writ of error denied); Missouri, K. & T. Ry. Co. of Texas v. Ellison (Tex. Civ. App.) 185 S. W. 1020 (writ of error denied); Alenkowsky v. T. & N. O. Ry. Co. (Tex. Civ. App.) 188 S. W. 956; H. & T. C. Ry. Co. v. Bright (Tex. Civ. App.) 156 S. W. 304 (writ of error denied); Reasonover v. G. C. & S. F. Ry. Co., 109 Tex.

204, 203 S. W. 592; M. K. & T. Ry. Co. of Tex. 204 203 S. W. 592; M. K. & T. Ry. Co. of Texas v. Haven (Tex. Civ. App.) 200 S. W. 1152 (writ of error denied); St. Louis S. W. Ry. Co. of Texas v. Thomas (Tex. Civ. App.) 244 S. W. 839; M. K. & T. Ry. Co. of Texas v. Reno (Tex. Civ. App.) 146 S. W. 207 (writ of error denied); M., K. & T. Ry. Co. of Texas v. Maples (Tex. Civ. App.) 162 S. W. 426 (writ of error denied).

"In several of the cases above cited it is held that it is immaterial that the agent of the defendant did not know that false representations, such as in the instant case, were in fact false."

In the case of JONES VS. GULF C. & S. F. R. CO., 73 S. W. 1082, cited by Petitioner, there is no conflict, but it supports Respondent, the Court holding:

"The allegations are sufficiently full to show that a fraud was practiced upon the plaintiff. On account of their special knowledge, it was reasonable that the plaintiff and his wife should believe the representations of the physicians. 'While it is true that a person cannot assert an estoppel based upon a representation, which, under the circumstances, he ought not to have believed and acted upon, it is, we think, equally true that, where one states a fact which is or should be within his knowledge, intending that it be believed and acted on as true, he should not ordinarily be heard to say that the other party ought not to have believed him, there being nothing to show to such other the falsity of the representations.' Parrish & Potter v. Hawes (Tex. Sup.) 66 S. W. 209.

"If a release has been procured by fraud, it is not necessary for the plaintiff to pay into Court the money received for its execution in order to have it set aside. McCarty v. H. & T. C. Ry. Co. (Tex. Civ. App). 54 S. W. 421."

The case of FUCHS, ET AL. VS. LEAHY, 9 S. W. (2d) 897, cited by Petitioner, is in no way applicable to the

facts of this case, it merely holding that where a real estate agent represents both the buyer and seller, the misconduct of the agent cannot be imputed more to one than to the other, the Court holding:

> "Now the false representations alleged to constitute the fraud were all made by Althemar, the agent of both plaintiff and defendant, if by anyone. Defendant was not present when they were made; there was no showing that he authorized or directed Althemar to make them or knew that he had made them; nor was there a particle of evidence that he acted in collusion with Althemar, or conspired with him for the purpose of misleading plaintiff."

In the case of GOODWIN VS. DANIEL, ET AL., 93 S. W. 534, cited by Petitioner, the facts are in no way applicable to this case, the Court holding:

> "It is established law, under the decision of this state, that, where affirmative representations of fact are made and designed to be acted upon by another, and he does act upon such representations, believing them to be true, when they are in fact false, the party making such false representations is rendered liable for the consequences thereof, regardless of the question of his knowledge of such falsity or intent to deceive. The proposition finds support, among others, in the following cases: Mitchell v. Zimmerman, 4 Tex. 80, 51 Am. Dec. 717; Haldeman v. Chambers, 19 Tex. 1; Pendarvis v. Gray, 41 Tex. 326; Loper v. Robison, 54 Tex. 514."

The case of BLAIR VS. BAIRD, 94 S. W. 116, cited by Petitioner, does not apply, it relating to the sale of a ranch and cattle, and *there was no fraud* either alleged or proven, the Austin Court of Civil Appeals holding:

> "By the terms of the contract O'Neal was the joint agent of the parties, and, unless it had been shown that he had conspired with appellant Blair to defraud

> appellees, appellants would not be responsible for any misconduct on the part of O'Neal. No evidence tending to establish such conspiracy or showing fraudulent conduct on the part of O'Neal was produced."

The case of AUSTIN, ET AL. VS. RUPE, ET AL., 141 S. W. 547, cited by Petitioner, in no way applies, as no fraud was either alleged or proven in regard to the execution of the deed.

The case of M. K. & T. RY. CO. VS. McGLAMORY, ET AL., 35 S. W. 1058, cited by Petitioner, does not apply, because after the trial Court in the case now before this Court had fully charged the jury that "*You will find for the defendant unless you find and believe that the release was procured by fraud and misrepresentation,*" and had also charged the jury: "*Now if the statements made by the agent (Massey) were true, then the plaintiff could not recover,*" (R. 607), and had further charged the jury:

> "And you further find and believe that the statements made by the agent and conveyed to plaintiff were not true, but were made to induce him to make the settlement, and that he acted upon them and that a man situated with the environments and conditions in which plaintiff was situated and in which defendant saw him situated, would have, in the exercise of ordinary prudence and judgment, acted as he acted, and relied upon the statements, then he may recover. If he did not believe them, then he could not recover, but if he believed them and relied upon them and they were untrue, and were made by the Claim Agent to mislead plaintiff, then you may find for the plaintiff.
>
> "In considering this you may take into consideration the action of the parties and surroundings, the amount paid and the extent of the injury as it appeared at that time, as she described it to the claim agent, and as it appeared to them both from the in-

formation at hand."

(R. 608).

"Now, if you find for the plaintiff, and that the release was procured by fraud, then you may further consider the extent of the plaintiff's damages." (R. 609).

The Court after so charging the jury, asked the attorneys if they had any objections to the charge, and the Petitioner's attorneys presented only two minor objections (R. 609-611), which the Court covered in his charge, and under Rule 8 Petitioner thereby was precluded from afterwards raising some other objection. The jury found that the release was procured "by fraud practiced upon plaintiff and his wife by defendant's adjuster." (R. 669-670). In said McGlamory case, the Court held:

"This rule does not permit a litigant to annoy the Court or confuse the jury by special charges upon the weight of, or giving prominence to, each circumstance introduced tending to support his defense."

Petitioner's Claim Agent, Frank Massey, admitted that on Monday morning, following the wreck Saturday night, before he had ever seen Respondent or his wife, he took his typewriter with him and sought out Dr. Curb, and employed Dr. Curb to make a statement, which statement addressed to his Bus Company said Claim Agent himself prepared on his typewriter, into which statement said Claim Agent put only such matters as he thought would benefit Petitioner, and then said Claim Agent knowing her husband was absent in another County, went to the sick bedside of Respondent's wife who he then learned was suffering and in pain, and learned from her that she was seriously injured in many ways not mentioned in the statement he had gotten Dr. Curb to sign, and which he

did not report back to Dr. Curb before procuring the release, (R. 527, 528, 529; 532, 533), and Dr. Curb admitted that he was paid $3 by Petitioner for making said statement prepared by Petitioner's Claim Agent (R. 397), and that no mention was made in said statement of the serious injuries "generally all over her body, and around her hips, and in her pelvic region" which Respondent's wife had complained about to him on the preceding day, when he saw her last (R. 398-399).

Because of the above, the case of FOX VS. DALLAS HOTEL CO., 240 S. W. 517, cited by Petitioner, does not apply, it likewise holding:

> "This rule does not permit a litigant to annoy the Court or confuse the jury by special charges upon the weight of, or giving prominence to, each circumstance introduced tending to support his defense."

Likewise, because of the above, the case of DALLAS RY. & TERMINAL CO. VS. ECTOR, 116 S. W. (2nd) 683, does not apply.

And, likewise, because of the above, MECHEM ON AGENCY (2nd ED.), Vol. 2, Sec. 2140, cited by Petitioner, does not apply, as Dr. Curb in signing the false statement about Mrs. Buchanan's condition, prepared by Petitioner's Claim Agent so that it contained only things that would benefit Petitioner, was not acting jointly, but was acting only for Petitioner, under Petitioner's employment, and was paid $3 by Petitioner for making such statement, knowing that Petitioner's Claim Agent was going to use it fraudulently in trying to obtain the release. Reference is again made to CORPUS JURIS SECUNDUM, VOL. 3, PAGE 192, cited by Petitioner, which holds:

"Where the principal has ratified the agent's fraud

by seeking to take advantage of the situation it brought about, he cannot avoid responsibility for the agent's actions by maintaining that the agent in so doing was acting outside his authority, or was purporting to be acting for both parties."

FINAL REMARKS

Petitioner neither pleaded nor offered in evidence any excuse whatever for its gross negligence in crashing its 33-passenger, 16,000-pound Greyhound Bus into the rear of the Chevrolet seriously injuring Respondent's wife for life. It did this on January 7, 1939. For over three and a half years it has exhausted every means that money can provide to keep from paying the just damages it caused Respondent.

Petitioner has ruined Respondent's life. It has ruined the life of his young wife. It has delayed, delayed and delayed. It is still trying to keep from paying him. It has put him to an enormous expense in fighting for his just and legal rights that he could ill afford to pay.

CONCLUSION

There is no conflict of decisions. There is no Federal question involved. There is no special or important reason for granting this petition. The Honorable United States Circuit Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; it has not decided an important question of federal law in a way that conflicts with applicable local decisions, or which has not been, but should be, settled by this Court, and has not decided a federal question in a way that is in conflict with applicable decisions of this Court, and it has not so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's power of supervision. Respondent respectfully submits that the petition for writ of certiorari should be in all things denied, and he so prays.

Respectfully submitted,

Thomas L. Blanton,
Attorney for Respondent,
A. L. Buchanan,
Albany, Texas.

OF COUNSEL:

John Matthews Blanton,
Abilene, Texas.

William W. Blanton,
Albany, Texas.

Copies of this Brief have been served upon Mr. Virgil T. Seaberry, Eastland, Texas, and Mr. Robert G. Payne, Dallas, Texas, Attorneys for Petitioner, Southwestern Greyhound Lines, Inc.